SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 22

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA ET AL., APPELLANTS,

vs.

YOUNG'S MARKET COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

INDEX

	Original	Print
Record from D. C. U. S., Southern District of California....	a	1
Caption .....(omitted in printing)..	a	
Citation and service .....(omitted in printing)..	2	
Bill in equity for injunction.....	6	1
Exhibit "A"—Alcoholic Beverage Control Act (omitted in printing).....	31	
Motion for temporary restraining order and application for hearing for interlocutory injunction.....	77	23
Restraining order pending determination of application for interlocutory injunction (omitted in printing)....	80	
Stipulation and order for extension of temporary restraining order (omitted in printing).....	84	
Motion to dismiss .....(omitted in printing)	87	
Return to order to show cause, restraining order and application for interlocutory injunction.....	91	24
Statement of evidence and order approving same.....	103	31
Opinion of Court	107	33
Special findings of fact and conclusions of law.....	117	41

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 7, 1936.

—7962-C

	Original	Print
Record from D. C. U. S., Southern District of California—Continued.		
Final decree and permanent injunction	146	64
Petition for appeal.....(omitted in printing)	159	
Order allowing appeal	162	71
Assignments of error.....(omitted in printing)	164	
Cost bond on appeal.....(omitted in printing)	189	
Præcipe for transcript of record (omitted in printing)	192	
Plaintiffs' and appellee's præcipe for additional portions of record (omitted in printing)	194	
Stipulation re record on appeal (omitted in printing)	198	
Clerk's certificate.....(omitted in printing)	201	
Order enlarging time to docket case	203	72
Statement of points to be relied upon and designation as to printing record	205	73
Stipulation in re printing of record	217	80

[fols. a-5] [Caption omitted]

[fol. 6]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. Eq. 736-H

YOUNG'S MARKET COMPANY, a Corporation; SIMON LEVI COMPANY, LTD., a Corporation; Haas Baruch & Company of San Diego, a Corporation; W. L. Koerber, Doing Business under the Fictitious Firm-name and Style of Koerber Distributing Company; George P. Higgins and George S. Higgins, Co-partners Doing Business under the Firm-Name and Style of Higgins & Higgins, a Co-partnership, Plaintiffs,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; Frank F. Merriam, Governor of the State of California; U. S. Webb, Attorney General of the State of California; Ray L. Riley, John C. Corbett, Fred E. Stewart, R. E. Collins, Orfa Jean Shontz, George M. Stout and A. H. Flickinger, Defendants

BILL IN EQUITY FOR INJUNCTION, ETC.—Filed July 30, 1935

To the Honorable the Judges of the District Court of the United States for the Southern District of California, Central Division:

Plaintiffs, corporations and individuals, citizens of the state of California, engaged in the business in California of importing beer manufactured in other states and distributing and selling such beer in California at wholesale, bring this suit on behalf of themselves and all other corporations and persons similarly situated, for the purpose of obtaining equitable relief and to enjoin and restrain the threatened deprivation, under color of certain statutes of the state of California, of certain rights, privileges and immunities secured to plaintiffs by the Constitution of the United States, the cause of action hereinafter asserted by

[fol. 7] plaintiffs having arisen under the Constitution of the United States, and the matter in controversy exceeding, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000), plaintiffs thereupon complain and respectfully show to your Honors:

I

That plaintiff, Young's Market Company, a corporation, is now and at all times hereinafter mentioned has been a corporation duly organized and existing under and by virtue of the laws of the state of California, with its principal office for the transaction of business in the city of Los Angeles, county of Los Angeles, state of California; that said plaintiff is and for more than one year last past has been duly authorized to conduct and has engaged in the business of the purchase and sale of beer at wholesale; that said plaintiff cannot and does not engage in the manufacture of beer within the state of California, or elsewhere.

That plaintiff Simon Levi Company, Ltd., a corporation, is now and at all times hereinafter mentioned has been a corporation duly organized and existing under and by virtue of the laws of the state of California with its principal office for the transaction of business in the city of Los Angeles, county of Los Angeles, state of California; that said plaintiff is and for more than one year last past has been duly authorized to conduct and has engaged in the business of the purchase and sale of beer at wholesale; that said plaintiff cannot and does not engage in the manufacture of beer within the state of California, or elsewhere.

That plaintiff, Haas Baruch & Company, of San Diego, a corporation, is now and at all times hereinafter mentioned has been a corporation duly organized and existing under and by virtue of the laws of the state of California, with its principal office for the transaction of business in the city of San Diego, county of San Diego, state of California; that said plaintiff is and for more than one year last past has been duly authorized to conduct and has en-
[fol. 8] gaged in the business of the purchase and sale of beer at wholesale; that said plaintiff cannot and does not engage in the manufacture of beer within the state of California, or elsewhere.

That plaintiff, W. L. Koerber, is a citizen and resident of San Jose, California, and is now and at all times here-

inafter mentioned has been engaged in the sale and distribution of beer at San Jose, California, under the fictitious firm-name and style of Koerber Distributing Company; that said plaintiff is now and for more than one year last past has been duly authorized to conduct and has engaged in the business of the purchase and sale of beer at wholesale; that said plaintiff does not engage in the manufacture of beer within the state of California, or elsewhere.

That plaintiffs, George P. Higgins and George S. Higgins, are citizens and residents of the city of Bakersfield, county of Kern, state of California, and are now and at all times hereinafter mentioned have been co-partners doing business under the firm name and style of Higgins & Higgins, authorized to conduct and engaged in the business of the purchase and sale of beer at wholesale; that said plaintiffs do not engage in the manufacture of beer within the state of California, or elsewhere.

II

That there are numerous other persons, corporations, firms and partnerships in the state of California engaged in business and occupations similar to that in which plaintiffs are engaged, and each of whom has an interest in the subject matter of this litigation; that said persons, corporations, firms and partnerships, many of whom are unknown to plaintiffs, are too numerous to be joined herein, and by reason thereof plaintiffs bring this action for themselves and in addition for the benefit of each and all of said persons, corporations, firms and partnerships similarly situated.

[fol. 9]

III

That defendant, Frank F. Merriam, is the duly qualified, elected and acting Governor of the State of California, and is the executive head of the government of the State of California, and possesses, is charged with and exercises, by virtue of the various laws of said State, a domination and control over the administration and enforcement of such laws, and particularly a certain statute entitled "An Act to license, regulate and control the manufacture, transportation, sale, purchase, possession and disposition of alcoholic beverages; to levy an excise tax on the sale of

alcoholic beverages; to provide for the licensing of the manufacture, distribution and sale of alcoholic beverages; to prescribe penalties for the violation of this act; to make an appropriation for the enforcement of this act; to take effect immediately", which said Act is known and designated as Senate Bill No. 919, Chapter 330, Statutes of 1935, of the State of California, and is hereinafter called "Alcoholic Beverage Control Act"; that said defendant, Frank F. Merriam, is a citizen and resident of the City of Long Beach, County of Los Angeles, State of California.

That defendant, State Board of Equalization of the State of California, is a board created and empowered to act under and by virtue of the provisions of the Constitution of the State of California and the statutes of the State of California relating and referring to the powers and constitution of such Board of Equalization of the State of California; that such board is the administrative board charged with various and sundry duties having to do with the assessment and collection of taxes and licenses within said State, and is particularly empowered and directed to enforce each and all of the provisions of the Alcoholic Beverage Control Act, as more particularly appears from the provisions thereof; that defendants, Ray L. Riley, John C. Corbett, Fred E. Stewart, R. E. Collins and Orfa Jean Shontz are, and each of them is, members of defendant, [fol. 10] Board of Equalization of the State of California; that said defendants, Ray L. Riley, John C. Corbett, Fred E. Stewart, R. E. Collins and Orfa Jean Shontz constitute the entire membership of said board.

That defendant, Ray L. Riley, is now and at all the times hereinafter mentioned has been chairman and controller of said Board of Equalization of the State of California, and as such chairman and controller of such Board of Equalization of the State of California is charged with the administration of such Alcoholic Beverage Control Act; that said Ray L. Riley is now and at all the times hereinafter mentioned has been a citizen and resident of the City of Colton, County of Los Angeles, State of California; that defendants, John C. Corbett, Fred E. Stewart, R. E. Collins and Orfa Jean Shontz, as members of said Board of Equalization of the State of California, are charged with the administration of such Alcoholic Beverage Control Act, and are citizens of and reside at the following locations: John

C. Corbett, City of San Francisco, County of San Francisco, State of California; Fred E. Stewart, City of Oakland, County of Alameda, State of California; R. E. Collins, City of Redding, County of Shasta, State of California; and Orfa Jean Shontz, City of Montrose, County of Los Angeles, State of California.

That defendant, George M. Stout, is the chief beverage control officer of defendant, State Board of Equalization of the State of California, and that defendant, A. H. Flickinger, is the chief beverage control administrator of said State Board of Equalization of the State of California, and as such both of said defendants are charged with the duty of administering and enforcing said Alcoholic Beverage Control Act.

That defendant, U. S. Webb, is the duly elected, qualified and acting Attorney General of the State of California, [fol. 11] and is the principal legal officer of said State and is charged with the enforcement of the laws of said State, and particularly is specifically charged with the enforcement of said Alcoholic Beverage Control Act.

IV

That said Alcoholic Beverage Control Act was enacted by the Legislature of the State of California, and was approved by defendant, Frank F. Merriam, as Governor of the State of California on the 13th day of June, 1935; that according to the terms thereof the same became effective on the 1st day of July, 1935; that a copy of said Act is attached hereto, marked Exhibit "A" and incorporated herein with the same force and effect as if set out herein in full.

V

That said Alcoholic Beverage Control Act is unconstitutional, in violation of the rights of plaintiffs, and void, in particular with regard to the following provisions thereof:

1. Section 2, subsection (k) thereof, which reads:

"'Importer' means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the act of importation is completed."

2. Section 3, which reads:

"On and after July 1, 1935, no person shall perform any act or acts which would constitute such person a manufacturer, rectifier, importer, wholesaler, or retailer of any alcoholic beverage within the meaning of this act or shall package, label or sell any alcoholic beverage unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act, or pursuant to the provisions of the State Liquor Control Act, Chapter 658, Statutes of 1933. Any person violating any provision of this section shall be guilty of a misdemeanor."

3. That portion of Section 5 thereof reading as follows:

"The following are the types of licenses to be issued under this act and the annual fees to be charged therefor:

* * * * * * *

8. Beer importers license.....$500.00 per year

* * * * * * *"

[fol. 12] 4. That portion of Section 6 thereof reading as follows:

"Except as otherwise provided in this act and subject to the provisions of section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges and no others at the premises for which issued during the year for which issued.

* * * * * * *

(d) Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license and to export such alcoholic beverage.

* * * * * * *"

5. That portion of Section 7 thereof reading as follows:

"Each license issued under this act shall be issued to a specific person, and * * * shall be issued for a specific location, the principal address of which shall be indicated on the license. Separate licenses shall be issued for each

of the premises of any business establishment having more than one location.

* * * * * * *

Each license issued under this act is separate and distinct, shall be nontransferable from one person to another, and shall be transferable from the premises for which issued only as may be permitted by the board, upon payment of a transfer fee of five dollars for each license.

* * * * * * *"

6. Section 49 thereof, which reads:

"Common or private carriers shall transport alcoholic beverages into the State only when such alcoholic beverages are to be consigned to a licensed importer. The carrier must obtain the receipt of such importer for the alcoholic beverage so transported and delivered and, if the consignee refuses to give a receipt and show his importer's license to the carrier, the carrier shall be relieved of all responsibility for delivering said alcoholic beverage. Where the consignee is not a licensed importer the carrier shall immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and address of the consignor and consignee and within ten days such alcoholic beverage shall be summarily forfeited to the State of California and shall be turned over to the board for sale at public auction."

7. Sections 10 and 11 of said Act in so far as they apply to importers' licenses, which said sections refer in substance to the manner of application for license and issuance or denial thereof.

8. Section 31 of said Act, in so far as said section applies [fol. 13] to importers' licenses, which said section specifies the manner of collection of said importer's license and provides for the seizure of the property of the importer for failure to pay such license.

VI

That under and by virtue of the provisions of said Alcoholic Beverage Control Act, and the authority purportedly conferred by it on defendants, State Board of Equaliza-

tion of the State of California, and the individuals constituting the said board, said defendants adopted, promulgated and threaten to enforce certain rules and regulations governing traffic in alcoholic beverages, among which said rules and regulations is the following:

"Rule 9—Imports

(a) Importer's License Necessary.—The owner or purchaser of alcoholic beverages shipped into this State from outside this State must have an appropriate Importer's license for the premises at which such beverages first come to rest in this State after the act of importation is completed.

A licensee holding an importer's license for one premise may not have alcoholic beverages shipped to him from a point outside the State directly to another premises in this State for which he has not been issued an Importer's license.

Furthermore, the holder of an Importer's license may not take orders from wholesalers or retailers throughout the State and ship such beverages from outside the State direct to such wholesalers or retailers unless they hold appropriate Importers' licenses for each of the premises to which such beverages are consigned. Beverages may be shipped from points outside the State only to premises for which Importers' licenses have been issued. After the beverages have been delivered to the premises for which the consignee holds an Importer's license, he may, if he desires to do so, reship them to other premises for which appropriate wholesale or retail licenses have been issued.

(b) Carriers Must Deliver Only to Licensed Importers.—No alcoholic beverages shall be transported into this State by any carrier, either common or private, unless consigned to a licensed importer. The carrier must obtain the receipt of such an importer for any beverages so transported, and if the carrier shall find that any shipment is consigned to, or intended for delivery to, anyone not a licensed importer, the beverages must not be delivered. In such case the carrier must immediately notify the board at Sacramento, giving full details as to the character of shipment, point of [fol. 14] origin, destination, and names and addresses of consignor and consignee; no such shipment shall be re-

leased by the carrier, except upon written order of the board.

(c) Carriers Must Report Imports Monthly.—Every carrier, common or private, operating into this State in foreign or interstate commerce shall report to the board monthly, on forms to be obtained from the board, as to all consignments of alcoholic beverages originating outside this State and transported by such carrier to points within this State. Such reports must be filed at Sacramento not later than the fifteenth day of each month as to all consignments so transported during the calendar month previous, and must show character of shipment, point of origin, destination and names and addresses of consignor and consignee of each consignment.

(d) Mail Shipments Confined to Licensed Importers.—No alcoholic beverages shall be transported into this State by United States mail for delivery to anyone except a licensed importer. Postal authorities shall refuse delivery of any shipment of alcoholic beverages originating outside of this State unless the addressee can establish to their satisfaction that he is duly licensed by this board to receive such a shipment.

(e) Importer's License Does Not Authorize Sale.—Every licensed importer who proposes to bottle or prepare imported alcoholic beverages or to sell such beverages in this State must first obtain appropriate Manufacturer's and Wholesaler's or Retailer's licenses as provided in the Act. An Importer's license does not authorize bottling, preparation or resale of alcoholic beverages nor does any other license authorize importation of such beverages."

VII

That under the laws of the State of California, and in particular under the provisions of the Alcoholic Beverage Control Act, beer is recognized as a commodity which may lawfully be made, bought and sold within the State of California, and is a proper and lawful subject of interstate commerce; that the right to manufacture, possess and sell beer within California is limited, restricted or prohibited only to the extent that the valid provisions of the Alcoholic Beverage Control Act limit, restrict or prohibit such manu-

facture, possession and sale; that the importation of beer into California from points without the State of California is lawful, and is restricted, limited or prohibited only to the extent that the valid provisions of the Alcoholic Beverage Control act so limit, restrict or prohibit such importa-
[fol. 15] tion.

Under the provisions of the Alcoholic Beverage Control Act a person engaged in the wholesale distribution and sale of beer manufactured within the State of California is required to obtain only a wholesaler's license and pay a license fee therefor of $50, whereas plaintiffs engaged in the business of importing, selling and distributing beer manufactured and brewed outside the state are purportedly required by said Act to obtain an importer's license and pay a fee therefor of $500 and a wholesaler's license and pay a fee therefor of $50; that the products of the plaintiffs and the right of the plaintiffs to sell and deal in the same is thereby discriminated against solely on the basis of their origin without the State of California, and, as such, such provisions of said act are in violation of the provisions of the Constitution of the United States as hereinafter set forth.

VIII

That said Alcoholic Beverage Control Act and the regulations issued thereunder are unconstitutional and void because at the time of their enactment and promulgation and ever since said date they were and are contrary to and in violation of Section 8 of Article I of the Constitution of the United States, which reads in part as follows:

"The Congress shall have power to * * * regulate commerce with foreign nations and among the several states and with the Indian tribes."

And also by reason of their violation of that portion of the 14th Amendment to the Constitution of the United States, which provides that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

And also by reason of their violation of that portion of [fol. 16] Section 2 of Article IV of the Constitution of the United States, which reads as follows:

"The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States;"

IX

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000); that the jurisdiction of this court is invoked because and by reason of certain and various federal questions involved, as follows: That the validity of the Alcoholic Beverage Control Act and the regulations issued and promulgated by defendant Board of Equalization and the members thereof is in question on the grounds that they violate, and ever since the enactment and promulgation thereof have violated, the provisions of Section 8 of Article I of the Constitution of the United States, and the 14th Amendment to the Constitution of the United States; that there is involved in this controversy the right of plaintiffs, and each of them, and others similarly situated, to buy, transport and import in interstate commerce, and to sell and deliver to purchasers in the State of California, beer manufactured outside of the State of California, free from the unlawful discriminatory provisions and onerous burdens imposed by the Alcoholic Beverage Control Act; that the right of plaintiffs to so buy, transport and import in interstate commerce, and to sell and deliver to purchasers in the State of California, beer manufactured outside the State of California, free from such unlawful burdens and discriminatory provisions of said act, is of a value as to each of them in excess of the sum of $3,000; that the value of the beer which each plaintiff has annually purchased, imported into and sold in the State of California, and which each will annually so buy, transport and import in interstate commerce into the State of California, upon being freed from such burdensome and discriminatory provisions as to each of plaintiffs, is greatly in excess of the sum of $25,000; that each of the plaintiffs, by reason of a [fol. 17] great expenditure of money by advertising and other means has developed and enjoys a large demand and sale for beer manufactured outside the State of California;

that in the State of California there exists a large demand on the part of numerous consumers and retail dealers for such beer so manufactured outside this State and sold and distributed in this State by plaintiffs and others similarly situated, and, but for the matters and things herein contained, each of the plaintiffs, and others similarly situated, could and would import and sell in the State of California a much greater amount than they now sell of beer manufactured outside the State of California.

X

That plaintiff, Young's Market Company, is and has for more than one year last past been engaged in the business of importing in interstate commerce from the State of Wisconsin into the State of California, beer manufactured and brewed by the Premier-Pabst Corporation, a corporation organized and existing under the laws of the State of Delaware, and engaged in the manufacture of beer in the State of Wisconsin, and that said plaintiff has built up and established a large and profitable trade in the sale of such products at wholesale in the cities of Los Angeles, Long Beach and San Diego, California; that said business amounts to a sum in excess of $400,000 annually; that said plaintiff maintains a warehouse and distribution facilities for sale and distribution of the beer so purchased and imported by it at each of the places of business as aforesaid, and is the holder of valid subsisting beer wholesaler's licenses issued by the State Board of Equalization of the State of California, authorizing said plaintiff to sell beer at wholesale at each of said places; that the method under which said plaintiff has conducted its business of purchasing, importing, selling and distributing said beer so imported, and under which it desires to continue its business, is as follows: Said plaintiff, Young's Market Company, places an order with Premier-Pabst Sales Company for the shipment of beer manufactured in Wisconsin by the said Premier-Pabst Corporation, to said plaintiff f.o.b. cars, Milwaukee, Wisconsin, for delivery to said plaintiff at one [fol. 18] of its aforesaid places of business; that pursuant to said order, Premier-Pabst Corporation ships, by a railroad common carrier, beer in car-load lots from the brewery of Premier-Pabst Corporation in Milwaukee, Wisconsin, to said plaintiff for delivery by the carrier at one of

the aforesaid places of business of said plaintiff in the State of California, where the same is received, unloaded and sold by said plaintiff in the course of its wholesale business conducted at said place.

That under the terms of said Alcoholic Beverage Control Act, Young's Market Company is required to procure from defendant, State Board of Equalization, an importer's license for each of the three points in the State of California whereat said plaintiff maintains a place of business, i. e., Los Angeles, Long Beach and San Diego, and said plaintiff is thereby taxed an unlawful and discriminatory tax in the sum of $1,500; that said plaintiff, under the terms of said act, may not cause beer to be shipped by said Premier-Pabst Corporation from Milwaukee, Wisconsin, or from any other point outside of the State of California, to any of its three places of business, without obtaining from defendant said importer's license for such point; that the railroad freight rates and other transportation charges from Milwaukee, Wisconsin, direct to San Diego and direct to Long Beach are much less than the railroad freight rates and other transportation charges from Milwaukee, Wisconsin, to Los Angeles, plus the freight rate and other transportation charges from Los Angeles to San Diego or to Long Beach, respectively. Accordingly, it has been this plaintiff's method of transacting business in the past, and this plaintiff desires to continue in the future, as it alleges it has a lawful right to do, to cause shipments of beer to be made from Milwaukee, Wisconsin, direct to its several places of business, without first having said shipment come to rest at its warehouse in Los Angeles.

[fol. 19] XI

That plaintiff, Simon Levi Company, Ltd:, is and has for more than one year last past been engaged in the business of importing in interstate commerce from the State of Wisconsin into the State of California, beer manufactured and brewed by the Jos. Schlitz Brewing Company in the city of Milwaukee, State of Wisconsin; that said business amounts to a sum in excess of $400,000 annually; that said Jos. Schlitz Brewing Company is a corporation, organized and existing under and by virtue of the laws of the State of Wisconsin, and is engaged in the manufacture of beer in the city of Milwaukee, State of Wisconsin; that said

plaintiff has built up and established a large and profitable trade in the sale of said product at wholesale in the cities of Los Angeles, Long Beach, San Diego, San Bernardino, Indio, El Centro, Needles, Winterhaven, Wilmington, Bakersfield, Fresno and Hanford, California; that said plaintiff maintains a warehouse and distribution facilities for sale and distribution of the beer so purchased and imported by it at each of the places of said plaintiff's business as aforesaid, and is the holder of valid subsisting beer wholesaler's licenses issued by the State Board of Equalization of the State of California, authorizing said plaintiff to sell beer at wholesale at each of said places; that the method under which said plaintiff has conducted its business of purchasing, importing, selling and distributing said beer so imported, and under which it desires to continue its business, is as follows: The plaintiff, Simon Levi Company, Ltd., places an order with the Jos. Schlitz Brewing Company for the shipment of beer manufactured in Wisconsin by the said Jos. Schlitz Brewing Company to said plaintiff, f.o.b. cars, Milwaukee, Wisconsin, for delivery to said plaintiff at one of its aforesaid places of business; that pursuant to said order, Jos. Schlitz Brewing Company ships, by a railroad common carrier, beer in carload lots from its brewery in Milwaukee, Wisconsin, to plaintiff for [fol. 20] delivery by the carrier at one of the aforesaid places of business of said plaintiff in the State of California, where the same is received, unloaded and sold by said plaintiff in the course of its wholesale business conducted at said place.

That under the terms of the Alcoholic Beverage Control Act, Simon Levi Company, Ltd., is required to procure from defendant, State Board of Equalization, an importer's license for each of the twelve points in the State of California whereat said plaintiff maintains a place of business, i. e., Los Angeles, Indio, El Centro, Needles, Winterhaven, San Bernardino, Long Beach, Wilmington, San Diego, Bakersfield, Fresno and Hanford, and said plaintiff is thereby taxed an unlawful and discriminatory tax under the terms of said act, in the sum of $6,000; that said plaintiff, under the terms of said act, may not cause beer to be shipped by said Jos. Schlitz Brewing Company from Milwaukee, Wisconsin, or from any other point outside of the State of California, to any of its twelve places

of business, without obtaining from defendant said importers's license for such point; that the railroad freight rates and other transportation rates and charges from Milwaukee, Wisconsin, direct to such points, and the back-haul or diversion rate from Milwaukee, Wisconsin, to such points, are much less than the railroad freight rates or other transportation charges from Milwaukee, Wisconsin, to Los Angeles, or to any of the other given points, plus the freight rate from Los Angeles, or such point, to any of the other points, respectively. Accordingly, it has been the method of transacting business of this plaintiff in the past, and this plaintiff desires to continue in the future, as it alleges it has a lawful right to do, to cause shipments of beer to be made from Milwaukee, Wisconsin, direct to its several places of business, or to divert such shipments to such places of business, or to utilize the privilege of a back-haul rate to such places of business, without first having said shipment come to rest at its warehouse in Los Angeles.

[fol. 21] XII

That plaintiff, Haas Baruch & Company, of San Diego, a corporation, is and has for more than one year last past been engaged in the business of importing in interstate commerce from the State of Missouri into the State of California, beer manufactured and brewed by Anheuser-Busch, Incorporated, in the city of St. Louis, State of Missouri; that said Anheuser-Busch, Incorporated, is a corporation, organized and existing under and by virtue of the laws of the State of Missouri, and is engaged in the manufacture of beer in the city of St. Louis, State of Missouri; that said plaintiff has built up and established a large and profitable trade in the sale of said product at wholesale in the city of San Diego, State of California; that said business amounts to a sum in excess of $25,000 annually; that said plaintiff maintains a warehouse and distribution facilities for the sale and distribution of the beer so imported by it at such place of said plaintiff's business as aforesaid, and is the holder of a valid subsisting beer wholesaler's license issued by defendant State Board of Equalization, authorizing said plaintiff to sell beer at wholesale at said place; that the method under which said plaintiff has conducted its business of importing, selling and distributing said beer so imported, and under which it desires to con-

tinue its business, is as follows: The plaintiff, Haas Baruch & Company of San Diego, places an order with Anheuser-Busch, Incorporated, for the shipment of beer manufactured in Missouri by said Anheuser-Busch, Incorporated, to said plaintiff, f.o.b. cars, St. Louis, Missouri, for delivery to said plaintiff at its aforesaid place of business; that pursuant to said order, Anheuser-Busch, Incorporated, ships, by a railroad common carrier, beer in carload lots from its brewery in St. Louis, Missouri, to said plaintiff for delivery by the carrier at the aforesaid place of business of said plaintiff in the State of California, where the same is received, unloaded and sold by said plaintiff in the [fol. 22] course of its wholesale business conducted at said place.

XIII

That plaintiff, W. L. Koerber, is and has for more than one year last past been engaged in the business of purchasing and importing in interstate commerce from the state of Wisconsin into the state of California, beer manufactured and brewed by the Premier-Pabst Corporation, a corporation, at Milwaukee, Wisconsin, which said corporation is organized and existing under the laws of the State of Delaware, and engaged in the manufacture of beer in the State of Wisconsin, and that said plaintiff has built up and established a large and profitable trade, under the firm-name and style of Koerber Distributing Company, in the sale of said product at wholesale in the city of San Jose, State of California; that said plaintiff maintains a warehouse and distribution facilities for the sale and distribution of the beer so imported by him at San Jose, and is the holder of a valid subsisting beer wholesaler's license issued by defendant State Board of Equalization, authorizing said plaintiff to sell beer at wholesale at said place; that the method under which said plaintiff has conducted his business of importing, selling and distributing said beer so imported, and under which he desires to continue his business, is as follows: The plaintiff places an order with Premier-Pabst Corporation for the shipment of beer manufactured in Wisconsin by the said Premier-Pabst Corporation, to said plaintiff, f.o.b. cars, Milwaukee, Wisconsin, for delivery to said plaintiff at San Jose, California; that pursuant to said order, Premier Pabst Corporation ships, by a railroad common carrier, beer in carload lots from the brewery of

Premier-Pabst Corporation in Milwaukee, Wisconsin, to said plaintiff for delivery by the carrier at San Jose, California, where the same is received, unloaded, sold and distributed by plaintiff in the course of his wholesale business conducted at said place.

XIV

That plaintiffs, George P. Higgins and George S. Higgins, [fol. 23] are and have for more than one year last past been engaged in the business of purchasing and importing in interstate commerce from the State of Wisconsin into the State of California, beer manufactured and brewed by the Premier-Pabst Corporation, a corporation, at Milwaukee, Wisconsin, which said corporation is organized and existing under the laws of the State of Delaware, and engaged in the manufacture of beer in the State of Wisconsin, and that said plaintiffs have built up and established a large and profitable trade, under the firm-name and style of Higgins & Higgins, in the sale of said product at wholesale in the city of Bakersfield, State of California; that said plaintiffs maintain a warehouse and distribution facilities for the sale and distribution of the beer so imported by them at Bakersfield, California, and are the holders of a valid subsisting beer wholesaler's license issued by the State Board of Equalization of the State of California, authorizing said plaintiffs to sell beer at wholesale at said place; that the method under which said plaintiffs have conducted their business of importing, selling and distributing said beer so imported, and under which they desire to continue their business, is as follows: The plaintiffs place an order with Premier-Pabst Corporation for the shipment of beer manufactured in Wisconsin by the said Premier-Pabst Corporation, to said plaintiffs, f.o.b. cars, Milwaukee, Wisconsin, for delivery to said plaintiffs at Bakersfield, California; that pursuant to said order, Premier-Pabst Corporation ships, by a railroad common carrier, beer in carload lots from the brewery of Premier-Pabst Corporation in Milwaukee, Wisconsin, to said plaintiffs for delivery by the carrier at Bakersfield, California, where the same is received, unloaded, sold and distributed by plaintiffs in the course of their wholesale business conducted at said place.

XV

That plaintiffs have ordered and intend to order in the future the shipment of beer brewed and manufactured out- [fol. 24] side of California to the points as hereinabove stated, to be shipped to their several warehouses and places of business in the State of California, and that the railroad carriers and transportation companies have been instructed by defendants not to deliver such shipments, and have been warned by defendants that the delivery of such shipments to plaintiffs at their several places of business, until plaintiffs shall have acquired for each of such places of business the aforementioned $500 importer's license, would be a violation of law, and that defendants would thereupon cause said railroad carriers to be prosecuted, and prevent such transportation; that under and by the terms of said Act and Rule 9, subdivision (a), promulgated thereunder, plaintiffs are required to obtain such importer's license for each of their many places of business, since the trans-shipment of beer from a central point to their several places of business is economically prohibited by the additional freight rates, as hereinabove referred to, and since they must cause a shipment of beer to be unloaded and warehoused before the same can be reshipped, all to their great and irreparable expense.

XVI

That there are approximately thirty-four breweries in the State of California which compete with plaintiffs in the sale and distribution of beer in the State of California and the distributors of such locally manufactured beer are not required to pay said importer's license of $500 or any other similar tax or license fee; that a large quantity of beer is brewed and manufactured in the State of California by said brewers, and said beer so manufactured in this State is competitive to the beer manufactured in the State of Wisconsin and in the State of Missouri, as hereinabove alleged, and by plaintiffs transported to California for sale in this State; that the prices at which beer so imported into the State of California may be sold at wholesale, as com- [fol. 25] pared with prices at which the beer manufactured in this State may be sold at wholesale, is an item entering into the salability of such imported product; that the im-

position of an importer's license at each of plaintiff's points of distribution is a direct charge upon the beer so imported and upon the prices at which said imported beer may be sold in the State of California, and is an unfair discrimination and charge as against such beer so manufactured outside of the State of California and in favor of the beer manufactured within the State of California. That plaintiffs have at their various branch stores and warehouses, as aforesaid, large sums of capital invested and used in the business heretofore conducted by them of distributing beer which they have imported from outside this State, which said investments will be greatly depreciated and rendered valueless if said beer importer's license of $500 be not declared unconstitutional and invalid; inasmuch as the said $500 is an additional charge to plaintiffs and an additional cost of said beer, plaintiffs will be prevented from competing in the sale and distribution of beer, with beer manufactured in the State of California, as to which no such license is required, and these plaintiffs will be forever excluded from the sale of imported beer at their said branch warehouses and stores; their business will be seriously impaired, if not lost and destroyed, their money, efforts and time in advertising their said business and the said imported beer and in creating a custom therefor will be lost and plaintiffs will thereby be deprived of their property without due process of law, and the loss and damage that will be suffered by these plaintiffs, if said act, in the particulars hereinabove set forth, be further enforced, will be irreparable. Relying upon the provisions of the Constitution of the United States, as set out in paragraph VIII hereof, plaintiffs and others engaged in the business of importing beer into the State of California, and similarly situated to the plaintiffs, have refused to apply for and [fol. 26] obtain an importer's license for each of the various places of business at which plaintiffs and others so similarly situated import and receive beer; that defendants and each of them have threatened to, and, unless restrained and enjoined by this court from so doing, will enforce against plaintiffs and others similarly situated each and all of the provisions of said Alcoholic Beverage Control Act including the unconstitutional and void provisions thereof hereinbefore specifically mentioned.

XVII

That by reason of the favored position in which manufacturers of, and wholesalers and dealers in, beer manufactured in the State of California are placed under the provisions of said act, plaintiffs and others similarly situated cannot sell beer so imported as hereinbefore set forth in the State of California at a reasonable or other profit and, therefore, their business, to the extent hereinbefore mentioned, will be seriously impaired if not actually lost and destroyed; that the damage and loss which will be so suffered by plaintiffs and others similarly situated if the aforementioned provisions of said act are enforced against them will be irreparable; that plaintiffs are without any plain, adequate or speedy remedy at law in the premises and it is only by aid of the injunctive processes of this court that plaintiffs can be fully protected in the enjoyment of their property and rights; that the granting of a permanent injunction by this court against the enforcement of the aforementioned provisions of the said Alcoholic Beverage Control Act will prevent a multiplicity of suits and prosecutions which will arise in the event of any attempt to enforce the same; that the questions herein involved can only be determined by a court of equity in a proceeding of this nature.

[fol. 27] Wherefore, plaintiffs pray:

1. That the act of the legislature of the State of California known as the Alcoholic Beverage Control Act, as enacted in Senate Bill No. 919, Chapter 330, Statutes of 1935 of California, so far as said act imposes a "beer importer's license" of $500 per year, as specified in subdivision 8, section 5 of said act, and the provisions for the collection of said beer importer's license, as provided for in section 31 of said act, and the penalties for the failure to pay said beer importer's license, as specified in said act, and the regulations promulgated by the State Board of Equalization of the State of California, on July 2, 1935, be declared, adjudged and decreed to be void and of no effect, because contrary to the rights of these plaintiffs under Section 8 of Article 1 of the Constitution of the United States, to the extent that such rights are thereby violated.

2. That the said provisions of the Alcoholic Beverage Control Act and said regulations promulgated by the State

Board of Equalization of the State of California be declared, adjudged and decreed to be void and of no effect, because contrary to and in violation of the rights of these plaintiffs under the 14th Amendment to the Constitution of the United States, to the extent that such rights are thereby violated.

3. That the defendants, and each of them, their respective appointees, assistants and employes and successors in office, and each of them, be enjoined from in any way or manner whatsoever enforcing against these plaintiffs, and other distributors of beer similarly situated, the provisions of said Alcoholic Beverage Control Act, or the regulations issued thereunder, or any part or parts thereof, in so far as they violate the provisions of the Constitution of the United States or the statutes of the United States, and in so far as they affect the right of these plaintiffs to import and sell beer within the State of California, and from attempting to enforce against these plaintiffs, and other beer dis- [fol. 28] tributors similarly situated, any of the provisions of said statute or regulations hereinabove complained of, and from instituting or causing to be instituted any prosecution or proceeding, civil or criminal, against these plaintiffs, or any of them, their officers, agents or employes, or any of them, or against any beer distributors similarly situated, to enforce any of such provisions of said statute or regulations.

4. That wherefore and for as much as the plaintiffs are remediless in the premises according to either the laws of the State of California or of the United States or under the common law, and remediable only in equity in this honorable Court, and to the end that the plaintiffs may be protected from unjust prosecutions and saved from the aforesaid heavy statutory penalties, and may not be subjected to a multiplicity of suits which will otherwise result, and may not suffer great and irreparable injury, loss and damage, and may be permitted to pursue and carry on their businesses without unlawful hindrance and obstruction, and that their property may not be subjected to illegal seizures, the plaintiffs pray that a writ of subpœna issue against the defendants to appear and fully submit and make answer to this bill of complaint; and that a hearing and determination shall be had herein by three judges, as pro-

vided by Section 380 of the United States Codes Annotated (Judicial Code, Section 266, as amended), for an interlocutory injunction; and that upon the organization of such three-judge court and upon due notice to the defendants and each of them, that an interlocutory injunction, suspending and restraining the enforcement, operation and execution of said statute of California as above specified be made and entered.

5. That meanwhile and until the hearing and determination of the application for an interlocutory injunction, as aforesaid, this honorable Court issue its temporary restraining order, as provided in said Section 380 of the United States Codes Annotated, to prevent immediate, great and irreparable injury, loss and damage to the plaintiffs which will result as aforesaid, and particularly with [fol. 29] respect to the aforesaid statutory penalties, before notice can be served and a hearing had upon the application for an interlocutory injunction, restraining the defendants, and each of them, their respective appointees, assistants, employes and successors in office, and each of them, from enforcing or attempting to enforce any of the provisions of the Alcoholic Beverage Control Act, so far as said act imposes a "beer importer's license" of $500 per year, as specified in subdivision 8, section 5 of said act, and restraining said defendants, their officers, appointees, assistants and employes from attempting to collect said beer importer's license, and from instituting or causing to be instituted any prosecution or proceeding, civil or criminal, against these plaintiffs, or others similarly situated, for a failure to pay said importer's license, as specified in said act, and from imposing or attempting to impose any of the penalties for the failure of plaintiffs, or other beer distributors similarly situated, to pay said beer importer's license, and from seizing or attempting to seize, selling or attempting to sell, any property of a beer importer for failure to pay said beer importer's license, and from forfeiting or attempting to forfeit to the State of California any beer imported into the State of California, for failure of the consignee to pay said beer importer's license, and from interfering with or attempting to prevent any common or private carrier from transporting beer into the State of California for the sole reason that such beer may be consigned to an importer who

has not obtained such beer importer's license, and from interfering with or attempting to prevent any common or private carrier from delivering to such consignee beer which has been transported into the State of California consigned to a person who does not have such beer importer's license, because of such lack of license.

6. That upon final hearing of this cause such injunction be made permanent.

7. For such other and further relief in the premises as to [fols. 30-76] this honorable Court may seem just and equitable.

Edwin A. Meserve, M. J. Donnelly, Baldwin Robertson, William Larrabee, by Baldwin Robertson, Solicitors for Plaintiffs. Meserve, Mumper, Hughes & Robertson, 615 Richfield Building, Los Angeles, California.

Exhibit "A" to bill, being copy of Alcoholic Beverage Control Act, is omitted in printing as it appears in full in Statement as to Jurisdiction.

[fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER AND APPLICATION FOR HEARING FOR INTERLOCUTORY INJUNCTION—Filed July 31, 1935

Now come plaintiffs and upon their verified complaint heretofore duly filed herein, file this their motion pursuant to section 380 of the United States Code Annotated (Judicial Code section 266 as amended) for the issuance of a temporary restraining order upon the grounds and in the manner set forth in said complaint to prevent immediate, great and irreparable injury, loss and damage which otherwise would result to the plaintiffs before the hearing and determination of the application for an interlocutory injunction herein may be had, or notice thereof be served,

particularly because of plaintiffs' statutory liability to pay the license tax complained of on July 1, 1935, and because in failing to so pay said taxes on or before said due date [fols. 78-90] said plaintiffs have become immediately liable by way of statutory penalty for the gross amount of said taxes and subject to the seizures provided for by said law as in their bill of complaint set forth and subject to the interference of their respective businesses as in said complaint set forth; and plaintiffs further make this their application to this court for a hearing on this cause for an interlocutory injunction in accordance with section 380 of the United States Codes Annotated.

E. A. Meserve, M. J. Donnelly, Baldwin Robertson and William Larrabee, by Baldwin Robertson, Attorneys for Plaintiffs. Meserve, Mumper, Hughes & Robertson, 615 Richfield Building, Los Angeles, California, of Counsel.

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

RETURN TO ORDER TO SHOW CAUSE, RESTRAINING ORDER AND APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed Sept. 4, 1935

To the Honorable Judges of the District Court of the United States for the Southern District of California, Central Division:

Come now the above named defendants, Board of Equalization of the State of California, John C. Corbett, Fred E. Stewart, Re. E. Collins, Orfa Jean Shontz, Frank F. Merriam and U. S. Webb, and each of them, and for their return to the Order to Show Cause, Temporary Restraining Order and Application for Interlocutory Injunction, and why the same should not be issued against them, respectfully state as follows:

[fol. 92] I

Deny that the Alcoholic Beverage Control Act of the State of California is unconstitutional in the particulars set forth in Paragraph V of the Bill in Equity herein,

and deny that said act is in violation of the rights of the plaintiffs, or any of them, in such particulars, and deny that the said act is unconstitutional and/or is in violation of the rights of plaintiffs, or any of them, in any particular whatsoever, but, on the contrary, aver that the said act is wholly and entirely within the provisions of the Constitution of the United States and each and all of the laws thereof, and does not in any manner whatsoever violate any of the rights of said plaintiffs, or any or either of them.

II

Deny that beer is a lawful and proper subject of interstate commerce, and on the contrary aver that the same is not a proper and lawful subject of interstate commerce, but that under the provisions of the XXI Amendment to the Constitution of the United States the same may be transported in interstate commerce only subject to such laws, statutes, regulations and restrictions as may be imposed by the several States.

III

Deny that plaintiffs, or any of them, are required by the said act to pay a fee of more than Fifty ($50.00) Dollars for a wholesalers license to engage in the business of selling and distributing beer manufactured and brewed outside the State or otherwise; deny that the products, or any of them, of the plaintiffs, or any or either of them, and/or the rights of such plaintiffs, or any or either thereof, to sell [fol. 93] and deal in the same is discriminated against solely on the basis of their origin without the State of California, or otherwise, or at all, and deny that any provisions of the said act are thereby, or in any manner, in violation of the provisions of the Constitution of the United States.

Admit that the first person in possession of beer brought into the State from without after the importation thereof has been completed is required to pay a license fee of Five Hundred dollars ($500.00), but aver that the same is a fee for possession only, and has nothing to do nor does it affect in any manner whatsoever the business or dealings in any way whatsoever with any such beer; aver that the business, or distribution, or sale or disposal of any beer within the State of California is regulated entirely under

the Wholesaler's License Fee in the amount of Fifty Dollars, ($50.00), and that the same pertains to any and all beer regardless of where manufactured, and does not discriminate against any beer imported from without the State.

IV

Deny that the said act, and the regulations issued thereunder, or either of them, or any part or portion of either of them, are unconstitutional and void, or unconstitutional or void because at any time whatsoever they were, or are, contrary to or in violation of Section 8 of Article I, and of Section 2 of Article IV, and of the Fourteenth Amendment to the Constitution of the United States, or either or any thereof, or either or any part or portion of the same; and deny that they were or are contrary to and in violation of any of the laws of the United States, and of any part or portion of the Constitution of the United States, or any or either thereof, but, on the contrary, aver that the said act and the regulations issued thereunder, and each of them, are wholly and entirely within the provisions of the Consti- [fol. 94] tution and laws of the United States in each and every particular.

V

Deny that the matter in controversy herein exceeds the sum or value of Three Thousand Dollars ($3,000.00), but on the contrary aver that the same does not exceed the sum or value of Five Hundred Dollars ($500.00).

Deny that the jurisdiction of this Court is invoked because and by reason of any Federal question involved, and on the contrary aver that no Federal question whatever is involved in this controversy and that the jurisdiction of this Court is not invoked thereby.

Deny that there is involved in this controversy the right of plaintiffs, or any or either of them, to buy, transport and import, or any thereof, in interstate commerce or otherwise, and to sell and deliver, or to sell or deliver to purchasers in this State beer manufactured outside of this State free from any alleged unlawful, discriminatory provisions and onerous burdens, or any or either thereof, imposed by the Alcoholic Beverage Control Act;

Deny that the rights of plaintiffs, or any or either of them, to buy, transport or import, or any or either thereof,

in interstate commerce or otherwise, and to sell and deliver or sell or deliver to purchasers in the State of California, beer manufactured outside of said State, free from any alleged unlawful burdens and discriminatory provisions of the said Act, is of a value as to each or any of them in excess of the sum of Three thousand dollars ($3,000.00) or any other sum in excess of Five hundred dollars ($500.00); aver that any such alleged rights of plaintiffs, or any or either of them, is not involved herein and that the entire matter in controversy herein is the Five hundred dollars [fol. 95] ($500.00) importer's tax or license fee.

VI

Deny that under the terms of said act the plaintiff, Young's Market Company, is required to procure from the State Board of Equalization, an importer's license for each of the three points in this State where said plaintiff maintains a place of business, but aver that said plaintiff is only required to obtain an importer's license in the event that such plaintiff is the person first in possession of beer within this State after the act of importation is completed, and that such license must be obtained for each place at which the said plaintiff becomes first in possession thereof; deny that such plaintiff under the said Act may not cause beer to be shipped from Milwaukee, Wisconsin, or from any other point outside of the State, to any of its places of business within this State without first obtaining such importer's license, and aver that it may cause beer to be shipped from any point without the State to any point within the State without in any manner being required to obtain any license of any kind whatsoever; deny.

[fol. 96]

VII

Deny that under the terms of said Act plaintiff, Simon Levi Company, Ltd., is required to procure from the State Board of Equalization an importer's license for each of the twelve points in the State of California where said plaintiff maintains a place of business and deny that said plaintiff is thereby or in any other manner whatsoever, taxed an unlawful and discriminatory or unlawful or discriminatory tax under the terms of said act, in the sum of $6,000.00 or in any other sum whatsoever, but on the contrary aver that

said plaintiff is only required to procure an importer's license in the event that said plaintiff first comes into possession of beer from without the State of California after the importation thereof has been completed, and then only at each of the points in this State where the plaintiff may first come into possession thereof; deny that said plaintiff by reason of said act may not cause beer to be shipped by anyone whatsoever from any point whatsoever without the State of California to any point whatsoever within the State of California, without obtaining from the State Board of Equalization an importer's license fee or any other license whatsoever; aver that the freight rate and transportation charges on beer imported from without the State to any point within the State, and then from there to different points of destination within this State, are no greater than the similar freight charges and transportation charges on beer from the point of manufacture within the State to the similar different points of destination in such State.

VIII

Defendants hereby make the same denial and averments as to each of the plaintiffs, Haas Baruch & Company, W. L. Koerber and Geo. P. and Geo. S. Higgins as they have [fol. 97] heretofore made as to the plaintiffs, Young's Market Company and Simon Levi Company, Ltd., and repeat the same herein as if specifically set forth.

IX

Deny that any railroad carriers and transportation companies, or any or either of them whatsoever, have been instructed by any defendants herein not to deliver shipments of beer to plaintiffs, or any of them, and deny that any defendant herein has warned any railroad carrier or transportation company whatsoever that the delivering of any shipment of beer to plaintiffs, or any of them, at their several places of business, or elsewhere within this State, would be a violation of law until said plaintiffs should have acquired their importer's license and that they would be prosecuted therefor and such transportation prevented.

X

Deny that imposition of the importer's license as provided for in said act is a direct charge upon the beer so

imported, and upon the prices at which the same may be sold in this State; deny that the same is an unfair discrimination and charge against such beer in favor of beer manufactured within this State; deny that any investment whatsoever of the plaintiffs, or either of them, will be greatly depreciated or depreciated at all and rendered valueless if said beer importer's license of $500.00 is not declared unconstitutional and/or invalid; deny that said plaintiffs, or either of them, will be prevented from competing in the sale and distribution of beer imported from without the State with the beer manufactured in this State, and deny that said plaintiffs, or either of them, will be excluded in any way whatsoever from the sale and distribution of such imported beer; deny that any business whatsoever of said [fol. 98] plaintiffs, or either of them, will be impaired in any way whatsoever by reason of any provisions or conditions of the said act; and deny that plaintiffs, or either of them, will in any manner whatsoever thereby be deprived of any property whatsoever without due process of law, or otherwise or at all; deny that the enforcement of any of the terms of said Act will result in loss and damage irreparable or otherwise or at all to these plaintiffs, or any of them.

[fol. 99] XI

Deny that by reason of the said act, or any part or portion thereof, any beer whatsoever imported from without the State of California is discriminated against in favor of beer manufactured within said State, but, on the contrary, aver that beer imported from without the State of California is only subject after arrival within said State to an importer's license fee of $500.00, whereas beer manufactured within said State is subject to a manufacturer's license of $750.00, and aver that the cost of shipment of such beer from any point within the State of California where it first comes into possession of such importer is no greater to the several points of destination than the shipment thereof from the factory where the beer manufactured within said State is made to the several points of destination thereof; deny that plaintiffs, or either of them, will suffer any irreparable damage and loss of any kind or nature whatsoever by reason of any of the provisions of said act, and aver that the most damage that can be suf-

fered by said plaintiffs, or either of them, is the amount of said importer's license fee, to-wit, the sum of $500.00; deny that plaintiffs, or either of them, are without any plain, adequate or speedy remedy at law in the premises; and deny that plaintiffs, or either of them, can only be protected in the enjoyment of their property and rights by reason of the injunctive processes of this court.

As and for a Further Return to said Order to Show Cause, Restraining Order, and Application for Interlocutory Injunction, said defendants, and each of them, state:

[fol. 100] I

That no valid cause of action in equity exists against said defendants or any or either of them in favor of plaintiffs or any or either of them, and that it appears from the said bill in equity that there is insufficiency of fact to constitute any such valid cause of action in equity, and that such bill in equity does not state facts sufficient to constitute a cause of action of any kind.

II

That said bill in equity does not show that this Court has jurisdiction by reason of the amount involved and that, further, the same shows upon its face that it does not have jurisdiction by reason of the amount involved, and that the said amount involved, as shown by said bill, is less than the amount provided and required by statute.

III

That said bill of equity does not show that this Court has jurisdiction by reason of any federal question involved and, further, that said bill shows upon its face that no federal questions are involved, and that the alleged federal questions mentioned therein are frivolous and unsubstantial.

IV

That this Court is without jurisdiction under any section of the Judicial Code or otherwise, or at all, to entertain the said bill in equity and/or to grant the relief prayed for therein.

V

That said bill in equity does not, nor do any of the allegations therein contained, entitle plaintiffs, or any of them, to relief in equity.

[fols. 101 & 102] VI

That it is not shown by said bill in equity that the plaintiffs, or any of them, will suffer irreparable injury by reason of any of the matters and things in said bill contained or alleged.

Wherefore, having made full and complete return, the said defendants, and each of them, respectfully pray this honorable Court to make, render and enter its order dissolving the restraining order heretofore made and entered herein, and refusing to grant to said plaintiffs, or either of them, any temporary or interlocutory injunction herein; and for such other and further relief as to this honorable Court shall be meet in the premises.

U. S. Webb, Attorney General, by Eugene M. Elson, Walter L. Bowers, Deputies Attorney General, Attorneys for Defendants.

[fol. 103] IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF EVIDENCE ON APPEAL—Filed March 31, 1936

This cause came on regularly to be heard before the three-judge court organized under the provisions of Section 380 of the United States Codes Annotated, the Honorable Curtis D. Wilbur, Judge of the United States Circuit Court of Appeals, Ninth Circuit, and the Honorables Harry Hollzer and Albert Lee Stephens, Judges of the United States District Court, Southern District of California, Central Division, Judges of said court, on the 4th day of September, 1935, in the courtrooms of the above entitled court, as theretofore designated by plaintiffs in a notice of said hearing, upon the application of plaintiffs for interlocutory injunction and the order directing the defendants to show cause before said court on plaintiffs' application for interlocutory injunction, and upon the re-

turn of defendants to said order to show cause, restraining order and application for interlocutory injunction and the motion of defendants to dismiss plaintiffs' bill in equity; and thereupon the following stipulations were made by plaintiffs and defendants, through their respective counsel of record, in open court: That plaintiffs' application for temporary injunction be heard upon plaintiffs' bill of complaint and the defendants' return to the order to show [fol. 104] cause, verification of such return being waived by plaintiffs, and it being likewise stipulated that further proof, hearing and argument upon plaintiffs' prayer for a permanent injunction be waived by the parties, and that the decree of the court entered upon this hearing should be a final disposition of this cause without the necessity of further hearing or proof upon the allegations of said bill; it being further stipulated that the issues for the determination of this Court are of law and not of fact, the said defendants conceding that the allegations of plaintiffs' complaint having to do with or referring to the jurisdiction of this court with respect to the fact that the plaintiff, Simon Levi Company, Ltd., a corporation, has been in the past and is now operating twelve separate warehouses, at each of which warehouses it has been in the habit of and is desirous of continuing in the future to import beer from outside of the State of California, and that under the provisions of the Alcoholic Beverage Control Act of the State of California said plaintiff would be required to obtain a separate beer importer's license for each of said warehouses, and pay annually, pursuant to said act, $500 for each of said twelve warehouses, or a total of $6,000, and that each of the remaining plaintiffs would be required to pay annually $500 for each separate warehouse maintained by such plaintiff, as alleged in the complaint, are true; that transportation charges from the point of manufacture of plaintiffs' products, direct to plaintiffs' several warehouses, are less than transportation charges to one central warehouse operated by each plaintiff, and reshipment therefrom to other points of distribution; that defendants have threatened to, and unless they are enjoined from so doing, will enforce all of the provisions of the Alcoholic Beverage Control Act of the State of California, against these plaintiffs and others similarly situated, including the provisions of said Act attacked herein by plaintiffs.

Whereupon the cause was argued and submitted to the court for its decision.

[fols. 105 & 106] It is hereby stipulated between plaintiffs and defendants, by and through their respective counsel of record, that the foregoing may be settled as the statement of evidence herein, pursuant to Equity Rule 75b.

Edwin A. Meserve, M. J. Donnelly, Baldwin Robertson, William Larrabee, and Meserve Mumper. Hughes & Robertson, by Baldwin Robertson, Attorneys for Plaintiffs and Appellees. U. S. Webb, Attorney General, by Walter Bowers, Deputy.

ORDER

The foregoing statement of evidence is hereby allowed, settled and approved, and ordered filed as the statement of evidence to be included in the record on appeal in the above entitled cause, as provided by Equity Rule 75b.

Dated, Los Angeles, California, this 17th day of March, 1936.

Hollzer, Judge.

[File endorsement omitted.]

[fol. 107] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. Eq. 736-H

YOUNG'S MARKET COMPANY, a Corporation, et al., Plaintiffs,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al., Defendants

OPINION—Filed Sept. 21, 1935

Plaintiffs bring this suit both on their own behalf and also for the benefit of all others similarly situated, to enjoin the enforcement of certain provisions of a statute recently enacted by the Legislature of the State of California, and known as the "Alcoholic Beverage Control Act."

The provisions hereunder attack impose a "beer importer's" license tax of $500.00 per year, define an "importer" as "every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof in this State after the act of importation is completed," also empower certain State officials to collect this tax, and to institute proceedings, civil and criminal, for any failure to pay such license tax, authorize the imposition of penalties for such failure, also empower certain State officials to seize and dispose of the property of the beer importer who fails to pay such license tax, also prohibit common and private carriers from delivering imported beer to any importer failing to pay such license tax. These provisions further require the payment of a like tax for each of the premises of any busi- [fol. 108] ness establishment having more than one location.

Upon commencement of this suit an order was issued, directing the defendant officials to show cause why the enforcement of the above mentioned provisions of the Act should not be enjoined and at the same time a temporary restraining order was issued.

The defendants have responded by interposing a motion to dismiss and, in addition, have filed a pleading which has been denominated as a return to the order to show cause.

At the hearing, counsel stipulated that the application for an injunction pendente lite and also the cause on its merits be submitted on the pleadings. In view of the statements made by the counsel at such hearing, we have concluded that the material allegations of fact set forth in the bill of complaint are not in *in* controversy and that the only issues raised by the return to the order to show cause are issues of law.

For more than a year past each of the plaintiffs has been, and still is, engaged in the business of importing beer into this State from either Wisconsin or Missouri.

In addition to the provisions hereinbefore noted, the statute in question prohibits any person engaging in business as a broker, jobber or wholesale merchant, dealing in alcoholic beverages, unless he shall have secured a license so to do from the defendant State Board of Equalization, and also prescribes an anuual license tax of $50.00 for such

license to sell beer at wholesale. A like charge is made for each separate establishment maintained by such wholesaler.

[fol. 109] All of the plaintiffs are "wholesalers" of beer and have secured the requisite licenses to engage in such business in this State.

It is conceded that, under this statute, a person who engages in business as a "wholesaler" of beer manufactured in California pays annually only a fifty dollar license tax for each establishment maintained by him in this State for that purpose, whereas a competing "wholesaler" of beer which he imports into this State pays a like charge, and in addition, is required to pay a further license tax of $500 for each establishment maintained by him for the receipt and possession of such imported beer.

One of the plaintiffs maintains, in each of twelve different cities in this State, a separate establishment to which it imports beer from Wisconsin, and for each of which premises it holds the requisite "wholesaler's" license to sell beer.

The plaintiffs, and others engaged in the business of importing beer into this State and similarly situated to them, have refused to apply for and obtain an importer's license for the various places of business at which they import and receive beer.

The defendants threaten, and unless enjoined from so doing will proceed, to enforce against plaintiffs and others similarly situated all of the provisions of said Act here under attack.

Plaintiffs contend that the provisions of the statute, the enforcement of which they here seek to enjoin, violate the commerce clause (Section 8, Article 1) and the equal protection clause (Section 1, Article XIV) of the Constitution of the United States.

[fol. 110] Defendants assert that "since the adoption of the Twenty-first Amendment to the United States Constitution, neither the commerce clause nor the equal protection clause of the United States Constitution applies to intoxicating liquors". In addition, defendants maintain that the act in question constitutes a proper exercise of its police power by the State.

With respect to the first ground of the defense interposed herein, a similar contention was raised and held

untenable in the recent case of Joseph Triner Corporation v. Arundel, et al., by the United States District Court in Minnesota, in a decision rendered by a three-judge court on June 29, 1935 (11 Fed. Supp. 145). Upon this point, the Court there said:

"With the contention that by this language it was intended that intoxicating liquors should be excepted from the provisions of the Commerce Clause and other provisions of the Constitution of the United States, we are unable to agree. The purpose of the provision referred to was to make it impossible for Congress to permit the transportation or importation into any State, Territory, or possession of the United States of intoxicating liquors in violation of the laws of the State, Territory or possession. In other words, the provision left the States, Territories and possessions free to determine to what extent, if at all, intoxicating liquor should be a lawful subject of commerce within their limits."

We are convinced that the foregoing statement is a correct construction of the 21st Amendment in its application to a state of facts such as we have in the case before us.

Passing now to a consideration of the remaining defense interposed herein, it is contended that even though it be held that, once the State permits the traffic in liquors within its borders, the requirements of the commerce clause as well as the equal protection clause of the 14th Amendment must be adhered to, nevertheless the provisions of the [fol. 111] law in question represent merely the exercise of the State's police power. In support of this contention it is urged:

1. "The fee imposed upon the importer in the instant case is a fee imposed for the privilege of receiving and possessing the beer brought in—imported from other States. * * * When the beer is delivered by the carriers to the plaintiffs at their respective places of business, the act of importation at that instant is completed, and the beer cases to be a subject of interstate commerce."

Accordingly, it is argued that the statute does not contravene the commerce clause of the Federal Constitution.

2. Finally, it is claimed that under this statute importers are a class distinct from others engaged in the liquor busi-

ness; that the State has set up a comprehensive system of licensing the various types of businesses arising in connection with the liquor traffic; that the license fee involved might be said to be imposed for the purpose of placing foreign beer on a parity with domestic brewers insofar as the amount of license fee for marketing the product is concerned; and accordingly it is urged that the statute does not effect a discrimination in violation of the equal protection clause of the 14th Amendment.

These two contentions may be disposed of together. As pointed out in the case of Darnell & Son v. Memphis, 208 U. S. 113, at pages 119 and 120:

"* * * while it is undoubted that it has been settled that where property which has moved in the channels of interstate commerce is at rest within a State and has become commingled with the mass of property therein, it may be taxed by such State without thereby imposing a direct burden upon interstate commerce, that doctrine, as expounded in the decided cases, including those relied upon by the court below, has always expressly excluded the conception that a State could, without directly burdening interstate commerce, discriminate against such property by imposing upon it a burden of taxation greater than that levied upon domestic property of a like nature."

[fol. 112] Again in the same case, the Court quoted with approval the following from the decision in Guy v. Baltimore, 100 U. S. 434:

"In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired."

Among other cases relied upon as a basis for the decision in the Darnal case was that of Webber v. Virginia, 103 U. S. 344. There the Court held a license statute of Virginia to be a regulation of commerce and invalid because it required that the agent for the sale of articles manufactured in other States must first obtain a license for which he was required to pay a tax for each county in which he sold or offered to sell them, while the agent for the sale of articles manufactured in that State, if acting for the manufacturer, was not required to obtain a license or pay any license tax.

Another citation referred to with approval in the Darnell decision was the case of Walling v. Michigan, 116 U. S. 446, where the Court held an act of the latter State, which imposed a tax or duty on persons who, not having their principal place of business within the State, engaged in the business of selling or of soliciting the sale of certain described liquors, to be shipped into the State, to be repugnant to the commerce clause, as being "a discriminating tax levied against persons for selling goods brought into [fol. 113] the State from other States or countries."

None of the cases cited by defendant's counsel sustains the position they have taken in the present suit. The case of American Steel and Wire Co. v. Speed, 192 U. S. 500, was considered in the Darnell decision. It was there pointed out that the case cited did not hold that, after goods have been imported into a State, the sale of such products may be regulated by State legislation which discriminates against the same and in favor of the same kind of goods produced within the State.

In Rosenberger v. Pacific Express Co., 241 U. S. 48, also cited by defendants' counsel, the Court held that a Texas statute, imposing special licenses on express companies maintaining officers for C. O. D. shipments of intoxicating liquors, was unconstitutional so far as interstate shipments were concerned.

In Evansville Brewing Association v. Excise Commission, 225 Federal, 204, while it was there decided that a certain Alabama statute was not discriminatory so far as the complainant in that case was concerned, the Court also said (page 209):

"The exaction of an additional license of the Alabama wholesale dealer for the privilege of selling foreign made

beer, when a like license is not exacted for the sale of beer of domestic manufacture, is an evident discrimination against the seller of the foreign made beer. [Citing cases.] If the Alabama wholesale dealer was the complainant, and there was no more in the case, his right to relief would be clear. However, in this case the complainant is the foreign brewer, and the question of discrimination is therefore to be determined with reference to it rather than to the local dealer."

The most recent expression of the Supreme Court relative to the question here under consideration is to be [fol. 114] found in the case of Baldwin et al. v. Selig, Inc., 294 U. S. 511, where the Court, on page 527, declared:

"* * * What is ultimate is the principle that one State in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the State of destination with the aim and effect of establishing an economic barrier against competition with the products of another State or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended."

An examination of the provisions of the statute involved in the case before us convinces us that this law discriminates between the wholesalers of beer imported into California and the wholesalers of beer manufactured in this State, to the detriment of the former.

While, as pointed out in the Joseph Triner case, supra, the equal protection clause of the Constitution does not prevent the State from adjusting its legislation to differences in situation, or forbid classification in that connec-

tion, "it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation." (See cases therein cited.)

In the Joseph Triner case the Court held invalid, as being in violation of the equal protection clause, a statute of Minnesota which prohibited the sale of liquor imported into that State in a finished condition unless the brand of such liquor had been registered in the United States [fols. 115 &116] Patent Office, and which statute imposed no similar restriction with respect to liquor manufactured in that State. There the Court said:

"We are unable to see any justification for making a distinction between those who are permitted to manufacture or process liquor within the State and those who are permitted to import liquor into the State, with respect to the use of registered or unregistered brands. If the registration of brands of liquor in the Patent Office has, as is contended, some tendency to protect the public from misbranded liquor or to place responsibility for liquor sold within the State, there seems no logical reason for making the law apply only to those who import the finished product. Under Chapter 390, the Minnesota manufacturer, processor or rectifier can sell his liquor to the public under an unregistered brand, whereas the Joseph Triner Corporation and all others similarly situated are prohibited from selling liquor similar in all respects, unless their brands are registered in the Patent Office."

These views, with which we are in accord, impel us to say that there is even less justification for making the distinction, created by the provisions of the statute here in question, between the wholesalers of beer manufactured in California and those who sell beer imported into the State, with respect to the amount charged for the privilege of selling beer. These provisions are in the nature of an economic barrier attempted to be established by legislation against competition with beer imported from other States—legislation, however, which contravenes the commerce clause and the equal protection clause of the Constitution of the United States and, therefore, is invalid.

A final injunction will issue in conformity with this opinion.

Dated this 20 day of September, 1935.

Curtis D. Wilbur, U. S. Cricuit Judge; —— Hollizer, U. S. District Judge; Albert Lee Stephens, U. S. District Judge.

[fol. 117] IN UNITED STATES DISTRICT COURT

[Title omitted]

Special Findings of Fact and Conclusions of Law under Equity Rule 70½—Filed Oct. 9, 1935

The matter of the application of plaintiffs herein for an interlocutory injunction having come on regularly for hearing on the 4th day of September, 1935, at the hour of ten o'clock A. M., in the courtroom of the Honorable Harry A. Hollzer, on the third floor of the Federal Building, Los Angeles, California, before the Honorable Curtis D. Wilbur, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, the Honorable Harry A. Hollzer, Judge of the District Court of the United States, for the Southern District of California, Central Division, and the Honorable Albert Lee Stephens, Judge of the District Court of the United States, for the Southern District of [fol. 118] California, Central Division, organized and sitting as a three-judge court under and by virtue of the provisions of Section 380 of the United States Code Annotated (Judicial Code, Section 266 as amended), for the hearing and determination of this cause, plaintiffs being represented and appearing by Baldwin Robertson and William Larrabee, of their counsel, and defendants, Board of Equalization of the State of California, John C. Corbett, Fred E. Stewart, R. E. Collins, Orfa Jean Shontz, Frank F. Merriam, Governor of the State of California, and U. S. Webb, being represented and appearing by their counsel, U. S. Webb, Attorney General of the State of California, by Eugene M. Elson and Walter L. Bowers, Esquires, and the motion of said defendants for a dismissal of plaintiffs' complaint having also come on for hearing at said time and place and having been heard, and it being stipulated and

agreed in open court by and between plaintiffs and said defendants, by and through their respective counsel of record, that plaintiffs' application for temporary injunction be heard upon plaintiffs' bill of complaint and the defendants' return to the order to show cause, verification of such return being waived by plaintiffs, and it being likewise stipulated that further proof, hearing and argument upon plaintiffs' prayer for a permanent injunction be waived by the parties, and that the decree of the court entered upon this hearing should be a final disposition of this cause without the necessity of further hearing or proof upon the allegations of said bill; it being further stipulated that the issues for the determination of this court are of law and not of fact, the said defendants conceding that the allegations of plaintiffs' complaint having to do with or referring to the jurisdiction of this court with respect to the fact that [fol. 119] the plaintiff Simon Levi Company, Ltd., a corporation, has been in the past and is now operating twelve separate warehouses, at each of which warehouses it has been in the habit of and is desirous of continuing in the future to import beer from outside of the State of California, and that under the provisions of the Alcoholic Beverage Control Act of the State of California said plaintiff would be required to obtain a separate beer importer's license for each of said warehouses, and pay annually, pursuant to said act, $500 for each of said twelve warehouses or a total of $6000, and that each of the remaining plaintiffs would be required to pay annually $500 for each separate warehouse maintained by such plaintiff as alleged in the complaint, also with respect to the truth and correctness of the allegations set forth in the remaining findings herein; and the court having announced its decision in favor of plaintiffs and against said defendants, the court being fully advised in the premises makes its findings of fact and conclusions of law as follows:

Findings of Fact

I

That plaintiff, Young's Market Company, a corporation, is now and at all times mentioned in these findings has been a corporation duly organized and existing under and by virtue of the laws of the State of California, with its prin-

cipal office for the transaction of business in the city of Los Angeles, county of Los Angeles, State of California; that plaintiff, Simon Levi Company, Ltd., a corporation, is now and at all times mentioned in these findings has been a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal office for the transaction of business in the city of Los [fol. 120] Angeles, county of Los Angeles, State of California; that plaintiff, Haas Baruch & Company, of San Diego, a corporation, is now and at all times mentioned in these findings has been a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal office for the transaction of business in the city of San Diego, county of San Diego, State of California; that plaintiff, W. L. Koerber, is now and at all times mentioned in these findings has been a citizen and resident of the city of San Jose, county of Santa Clara, State of California, engaged in business at the city of San Jose, California, under the fictitious firm-name and style of Koerber Distributing Company; that plaintiffs, George P. Higgins and George S. Higgins, are now and at all times mentioned in these findings have been citizens and residents of the city of Bakersfield, county of Kern, State of California, and are now and at all times mentioned in these findings have been co-partners doing business under the firm name and style of Higgins & Higgins.

II

That there are numerous other persons, corporations, firms and partnerships in the State of California engaged in businesses and occupations similar to that in which plaintiffs are engaged, each of whom has an interest in the subject matter of this litigation; that said persons, corporations, firms and partnerships are too numerous to be joined as parties plaintiff herein; that plaintiffs have properly brought this action for themselves and for the benefit of each and all of said persons, corporations, firms and partnerships similarly situated, with respect to the business of importing beer from outside the State of California; that this is a class or representative action, and [fol. 121] such others so similarly situated are entitled to the benefit of whatever relief plaintiffs may have or be entitled to.

III

That defendant, Frank F. Merriam, is the duly qualified, elected and acting Governor of the State of California, and is the executive head of the government of the State of California; that the Legislature of the State of California passed a certain statute entitled "An Act to license, regulate and control the manufacture, transportation, sale, purchase, possession and disposition of alcoholic beverages; to levy an excise tax on the sale of alcoholic beverages; to provide for the licensing of the manufacture, distribution and sale of alcoholic beverages; to prescribe penalties for the violation of this act; to make an appropriation for the enforcement of this act; to take effect immediately", which said act is known and designated as Senate Bill No. 919, Chapter 330, Statutes of 1935 of the State of California, and is hereinafter called "Alcoholic Beverage Control Act"; that said defendant, Frank F. Merriam, is a citizen and resident of the city of Long Beach, county of Los Angeles, State of California.

That defendant, State Board of Equalization of the State of California, is a board created and empowered to act under and by virtue of the provisions of the Constitution of the State of California and the statutes of the State of California relating and referring to the powers and constitution of such Board of Equalization of the State of California; that such board is the administrative board charged with various and sundry duties having to do with the assessment and collection of taxes and licenses within said State, and is particularly empowered and directed to en- [fol. 122] force each and all of the provisions of the Alcoholic Beverage Control Act, as more particularly appears from the provisions thereof; that defendants, John C. Corbett, Fred E. Stewart, R. E. Collins and Orfa Jean Shontz are, and each of them is, members of defendant, Board of Equalization of the State of California; that defendants, John C. Corbett, Fred E. Stewart, R. E. Collins and Orfa Jean Shontz, as members of said Board of Equalization of the State of California, are charged with the administration of such Alcoholic Beverage Control Act, and are citizens of and reside at the following locations: John C. Corbett, city of San Francisco, county of San Francisco, State of California; Fred E. Stewart, city of Oakland, county of Alameda, State of California; R. E. Collins, city

of Redding, county of Shasta, State of California; and Orfa Jean Shontz, city of Montrose, county of Los Angeles, State of California.

That defendant, U. S. Webb, is the duly elected, qualified and acting Attorney General of the State of California, and is the principal legal officer of said State and is charged with the enforcement of the laws of said State, and particularly is specifically charged with the enforcement of said Alcoholic Beverage Control Act.

IV

That said Alcoholic Beverage Control Act was enacted by the Legislature of the State of California, and was approved by defendant, Frank F. Merriam, as Governor of the State of California, on the 13th day of June, 1935; that according to the terms thereof the same became effective on the 1st day of July, 1935; that said Alcoholic Beverage Control Act is in words and figures as follows:

[fol. 123] (Hereat (pp. 6 to 50 inclusive of the Findings) the court set out in haec verba an exact copy of Senate Bill No. 919, Chapter 330, Statutes of 1935 of the State of California, as the same is set forth at large in the Jurisdictional Statement on Appeal.)

V

That under and by virtue of the provisions of said Alcoholic Beverage Control Act, and the authority purportedly conferred by it on defendants, State Board of Equalization of the State of California, and the individual members of said board hereinbefore named, said defendants adopted, promulgated and threaten to enforce certain rules and regulations governing traffic in alcoholic beverages, among which said rules and regulations is the following:

"Rule 9—Imports

(a) Importer's License Necessary.—The owner or purchaser of alcoholic beverages shipped into this State from outside this State must have an appropriate Importer's license for the premises at which such beverages first come to rest in this State after the act of importation is completed.

A licensee holding an importer's license for one premise may not have alcoholic beverages shipped to him from a point outside the State directly to another premise in this State for which he has not been issued an Importer's license.

Furthermore, the holder of an Importer's license may not take orders from wholesalers or retailers throughout the State and ship such beverages from outside the State direct to such wholesalers or retailers unless they hold appropriate Importers' licenses for each of the premises to which such beverages are consigned. Beverages may be shipped from points outside the State only to premises for which Importers' licenses have been issued. After the beverages have been delivered to the premises for which the consignee holds an Importer's license, he may, if he desires to do so, reship them to other premises for which appropriate wholesale or retail licenses have been issued.

(b) Carriers Must Deliver Only to Licensed Importers.—[fol. 124] No alcoholic beverages shall be transported into this State by any carrier, either common or private, unless consigned to a licensed importer. The carrier must obtain the receipt of such an importer for any beverages so transported, and if the carrier shall find that any shipment is consigned to, or intended for delivery to, anyone not a licensed importer, the beverages must not be delivered. In such case the carrier must immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and names and addresses of consignor and consignee; no such shipment shall be released by the carrier, except upon written order of the board.

(c) Carriers Must Report Imports Monthly.—Every carrier, common or private, operating into this State in foreign or interstate commerce shall report to the board monthly, on forms to be obtained from the board, as to all consignments of alcoholic beverages originating outside this State and transported by such carrier to points within this State. Such reports must be filed at Sacramento not later than the fifteenth day of each month as to all consignments so transported during the calendar month previous, and must show character of shipment, point of origin, destination and names and addresses of consignor and consignee of each consignment.

(d) Mail Shipments Confined to Licensed Importers.—No alcoholic beverages shall be transported into this State by United States mail for delivery to anyone except a licensed importer. Postal authorities shall refuse delivery of any shipment of alcoholic beverages originating outside of this State unless the addressee can establish to their satisfaction that he is duly licensed by this board to receive such a shipment.

(e) Importer's License Does Not Authorize Sale.—Every licensed importer who proposes to bottle or prepare imported alcoholic beverages or to sell such beverages in this State must first obtain appropriate Manufacturer's and Wholesaler's or Retailer's licenses as provided in the Act. An Importer's license does not authorize bottling, preparation or resale of alcoholic beverages nor does any other license authorize importation of such beverages."

VI

That under the laws of the State of California, and in particular under and by virtue of the provisions of the Alcoholic Beverage Control Act, beer is recognized as a commodity which may be lawfully made, bought and sold [fol. 125] within the State of California; that the right to manufacture, possess and sell beer within the State of California is limited, restricted or prohibited only to the extent that the valid provisions of the Alcoholic Beverage Control Act limit, restrict or prohibit such manufacture, possession and sale; that the importation of beer into the State of California from points without the State of California is lawful and is restricted, limited or prohibited only to the extent that the valid provisions of the Alcoholic Beverage Control Act so limit, restrict or prohibit such importation.

VII

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000).

VIII

That the plaintiff, Young's Market Company, is now and has for more than one year last past been engaged in the business of the purchase and sale of beer at wholesale, and

cannot and does not engage in the manufacture of beer within the state of California, or elsewhere; that the said plaintiff in the operation of its business imports in interstate commerce beer manufactured and brewed by the Premier-Pabst Corporation, a corporation organized and existing under the laws of the State of Delaware, and engaged in the manufacture of beer in the State of Wisconsin, and that said plaintiff has built up and established a large and profitable trade in the sale of said products at wholesale in the cities of Los Angeles, Long Beach and San Diego, California; that said business amounts to a sum in excess of $400,000 annually; that said plaintiff maintains a warehouse and distribution facilities for sale and distribution [fol. 126] of the beer so purchased and imported by it at each of the places of business as aforesaid, and is the holder of valid subsisting beer wholesaler's licenses issued by the State Board of Equalization of the State of California, authorizing said plaintiff to sell beer at wholesale at each of said places; that the method under which said plaintiff has conducted its business of purchasing, importing, selling and distributing said beer so imported, and under which it desires to continue its business, is as follows: Said plaintiff, Young's Market Company, places an order with Premier-Pabst Sales Company for the shipment of beer manufactured in Wisconsin by the said Premier-Pabst Corporation, to said plaintiff f.o.b. cars, Milwaukee, Wisconsin, for delivery to said plaintiff at one of its aforesaid places of business; that pursuant to said order, Premier-Pabst Corporation ships, by a railroad common carrier, beer in carload lots from the brewery of Premier-Pabst Corporation in Milwaukee, Wisconsin, to said plaintiff for delivery by the carrier at one of the aforesaid places of business of said plaintiff in the State of California, where the same is received, unloaded and sold by said plaintiff in the course of its wholesale business conducted at said place.

That under the terms of said Alcoholic Beverage Control Act, Young's Market Company is required to procure from defendant, State Board of Equalization, an importer's license for each of the three points in the State of California whereat said plaintiff maintains a place of business for the importation of beer from outside the State of California, i.e., Los Angeles, Long Beach and San Diego, and said plaintiff is thereby taxed the sum of $1,500; that said

plaintiff, under the terms of said act, may not cause beer to be shipped by said Premier-Pabst Corporation from Mil-
[fol. 127] waukee, Wisconsin, or from any other point outside of the State of California, to any of its said three places of business for the importation of beer from outside the State of California, without obtaining from defendant said importer's license for such point; that the railroad freight rates and other transportation charges from Milwaukee, Wisconsin, direct to San Diego and direct to Long Beach are much less than the railroad freight rates and other transportation charges from Milwaukee, Wisconsin, to Los Angeles, plus the freight rate and other transportation charges from Los Angeles to San Diego or to Long Beach respectively. Accordingly, it has been this plaintiff's method of transacting business in the past, and this plaintiff desires to continue in the future to cause shipments of beer to be made from Milwaukee, Wisconsin, direct to its several places of business, without first having said shipment come to rest at its warehouse in Los Angeles.

IX

That plaintiff, Simon Levi Company Ltd., is now and has for more than one year last past been engaged in the business of the purchase and sale of beer at wholesale, and cannot and does not engage in the manufacture of beer within the State of California, or elsewhere; that the said plaintiff in the operation of its business imports in interstate commerce beer manufactured and brewed by the Jos. Schlitz Brewing Company in the city of Milwaukee, State of Wisconsin; that said business amounts to a sum in excess of $400,000 annually; that said Jos. Schlitz Brewing Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and is engaged in the manufacture of beer in the city of Milwaukee, State of Wisconsin; that said plaintiff has built up and
[fol. 128] established a large and profitable trade in the sale of said product at wholesale in the cities of Los Angeles, Long Beach, San Diego, San Bernardino, Indio, El Centro, Needles, Winterhaven, Wilmington, Bakersfield, Fresno and Hanford, California; that said plaintiff maintains a warehouse and distribution facilities for sale and distribution of the beer so purchased and imported by it at each of the

places of said plaintiff's business as aforesaid, and is the holder of valid subsisting beer wholesaler's licenses issued by the State Board of Equalization of the State of California, authorizing said plaintiff to sell beer at wholesale at each of said places; that the method under which said plaintiff has conducted its business of purchasing, importing, selling and distributing said beer so imported, and under which it desires to continue its business, is as follows: The plaintiff, Simon Levi Company, Ltd., places an order with the Jos. Schlitz Brewing Company for the shipment of beer manufactured in Wisconsin by the said Jos. Schlitz Brewing Company to said plaintiff f.o.b. cars, Milwaukee, Wisconsin, for delivery to said plaintiff at one of its aforesaid places of business; that pursuant to said order, Jos. Schlitz Brewing Company ships, by a railroad common carrier, beer in carload lots from its brewery in Milwaukee, Wisconsin, to plaintiff for delivery by the carrier at one of the aforesaid places of business of said plaintiff in the State of California, where the same is received, unloaded and sold by said plaintiff in the course of its wholesale business conducted at said place.

That under the terms of the Alcoholic Beverage Control Act, Simon Levi Company, Ltd., is required to procure from defendant, State Board of Equalization an importer's [fol. 129] license for each of the twelve points in the State of California whereat said plaintiff maintains a place of business for the importation of beer from outside the State of California, i.e., Los Angeles, Indio, El Centro, Needles, Winterhaven, San Berhardino, Long Beach, Wilmington, San Diego, Bakersfield, Fresno and Hanford, and said plaintiff is thereby taxed the sum of $6,000; that said plaintiff, under the terms of said act, may not cause beer to be shipped by said Jos. Schlitz Brewing Company from Milwaukee, Wisconsin, or from any other point outside of the State of California, to any of its said twelve places of business for the importation of beer from outside the State of California, without obtaining from defendant said importer's license for such point; that the railroad freight rates and other transportation rates and charges from Milwaukee, Wisconsin, direct to such points, and the back-haul or diversion rate from Milwaukee, Wisconsin, to such points, are much less than the railroad freight rates or other transportation charges from Milwaukee, Wisconsin,

to Los Angeles, or to any of the other given points, plus the freight rate from Los Angeles, or such points, to any of the other points, respectively. Accordingly, it has been the method of transacting business of this plaintiff in the past, and this plaintiff desires to continue in the future to cause shipments of beer to be made from Milwaukee, Wisconsin, direct to its several places of business, or to divert such shipments to such places of business, or to utilize the privilege of a back-haul rate to such places of business, without first having said shipment come to rest at its warehouse in Los Angeles.

X

That plaintiff, Haas Baruch & Company, of San Diego, [fol. 130] is now and has for more than one year last past been engaged in the business of the purchase and sale of beer at wholesale, and cannot and does not engage in the manufacture of beer within the State of California, or elsewhere; that the said plaintiff in the operation of its business imports in interstate commerce beer manufactured and brewed by Anheuser-Busch, Incorporated, in the city of St. Louis, State of Missouri; that said Anheuser-Busch, Incorporated, is a corporation organized and existing under and by virtue of the laws of the state of Missouri, and is engaged in the manufacture of beer in the city of St. Louis, State of Missouri; that said plaintiff has built up and established a large and profitable trade in the sale of said product at wholesale in the city of San Diego, State of California; that said business amounts to a sum in excess of $25,000 annually; that said plaintiff maintains a warehouse and distribution facilities for the sale and distribution of the beer so imported by it at such place of said plaintiff's business as aforesaid, and is the holder of a valid subsisting beer wholesaler's license issued by defendant State Board of Equalization, authorizing said plaintiff to sell beer at wholesale at said place; that the method under which said plaintiff has conducted its business of importing, selling and distributing said beer so imported, and under which it desires to continue its business, is as follows: The plaintiff, Haas Baruch & Company, of San Diego, places an order with Anheuser-Busch, Incorporated, for the shipment of beer manufactured in Missouri by said Anheuser-Busch, Incorporated, to said plaintiff f.o.b. cars, St. Louis,

Missouri, for delivery to said plaintiff at its aforesaid place of business; that pursuant to said order, Anheuser-Busch, Incorporated, ships by a railroad common carrier, [fol. 131] beer in carload lots from its brewery in St. Louis, Missouri, to said plaintiff for delivery by the carrier at the aforesaid place of business of said plaintiff in the State of California, where the same is received, unloaded and sold by said plaintiff in the course of its wholesale business conducted at said place.

XI

That plaintiff, W. L. Koerber, is now and has for more than one year last past been engaged in the business of the purchase and sale of beer at wholesale, and cannot and does not engage in the manufacture of beer within the State of California, or elsewhere; that the said plaintiff in the operation of its business imports in interstate commerce beer manufactured and brewed by the Premier-Pabst Corporation, a corporation, at Milwaukee, Wisconsin, which said corporation is organized and existing under the laws of the State of Delaware, and engaged in the manufacture of beer in the State of Wisconsin, and that said plaintiff has built up and established a large and profitable trade, under the firm-name and style of Koerber Distributing Company, in the sale of said product at wholesale in the city of San Jose, State of California; that said plaintiff maintains a warehouse and distribution facilities for the sale and distribution of the beer so imported by him at San Jose, and is the holder of a valid subsisting beer wholesaler's license issued by defendant State Board of Equalization, authorizing said plaintiff to sell beer at wholesale at said place; that the method under which said plaintiff has conducted his business of importing, selling and distributing said beer so imported, and under which he desires to continue his business, is as follows: The plaintiff places an order with Premier-Pabst Corporation for the shipment of beer manu- [fol. 132] factured in Wisconsin by the said Premier-Pabst Corporation, to said plaintiff f.o.b. cars, Milwaukee, Wisconsin, for delivery to said plaintiff at San Jose, California; that pursuant to said order, Premier-Pabst Corporation ships by a railroad common carrier, beer in carload lots from the brewery of Premier-Pabst Corporation, in Milwaukee, Wisconsin, to said plaintiff for delivery by

the carrier at San Jose, California, where the same is received, unloaded, sold and distributed by plaintiff in the course of his wholesale business conducted at said place.

XII

That plaintiffs, George P. Higgins and George S. Higgins, are now and have for more than one year last past been engaged in the business of the purchase and sale of beer at wholesale, and cannot and do not engage in the manufacture of beer within the State of California, or elsewhere; that the said plaintiffs in the operation of their business import in interstate commerce beer manufactured and brewed by the Premier-Pabst Corporation, a corporation, at Milwaukee, Wisconsin, which said corporation is organized and existing under the laws of the State of Delaware, and engaged in the manufacture of beer in the State of Wisconsin, and that said plaintiffs have built up and established a large and profitable trade, under the firm-name and style of Higgins & Higgins, in the sale of said product at wholesale in the city of Bakersfield, State of California; that said plaintiffs maintain a warehouse and distribution facilities for the sale and distribution of the beer so imported by them at Bakersfield, California, and are the holders of a valid subsisting beer wholesaler's license issued by the State Board of Equalization of the State of California, authorizing said plaintiffs to sell beer [fol. 133] at wholesale at said place; that the method under which said plaintiffs have conducted their business of importing, selling and distributing said beer so imported, and under which they desire to continue their business, is as follows: The plaintiffs place an order with Premier-Pabst Corporation for the shipment of beer manufactured in Wisconsin by the said Premier-Pabst Corporation to said plaintiffs f.o.b. cars, Milwaukee, Wisconsin, for delivery to said plaintiffs at Bakersfield, California; that pursuant to said order, Premier-Pabst Corporation ships by a railroad common carrier, beer in carload lots from the brewery of Premier-Pabst Corporation in Milwaukee, Wisconsin, to said plaintiffs for delivery by the carrier at Bakersfield, California, where the same is received, unloaded, sold and distributed by plaintiffs in the course of their wholesale business conducted at said place.

XIII

That the right of plaintiffs to buy, transport and import in interstate commerce, and to sell and deliver to purchasers in the State of California, beer manufactured outside the State of California, free from the provisions of the Alcoholic Beverage Control Act relating to the so-called beer importer's license, is of a value as to each of them in excess of the sum of $3,000; that the value of the beer which each plaintiff has annually purchased, imported into and sold in the State of California, and which each will annually so buy, transport and import in interstate commerce into the State of California, upon being freed from such provisions, is as to each of plaintiffs greatly in excess of the sum of $25,000; that each of the plaintiffs, by reason of a great expenditure of money, by advertising and other means has developed and enjoys a large demand and sale [fol. 134] for beer manufactured outside the State of California; that in the State of California there exists a large demand on the part of numerous consumers and retail dealers for such beer so manufactured outside the State of California and sold and distributed in the State of California by plaintiffs and others similarly situated, and, but for the provisions of said Alcoholic Beverage Control Act relating to said so-called beer importer's license, each of the plaintiffs, and others similarly situated, could and would import and sell in the State of California a much greater amount than they now sell of beer manufactured outside the State of California.

XIV

That plaintiffs have ordered and intend to order in the future the shipment of beer brewed and manufactured outside of California, to the points as hereinabove stated to be shipped to their several warehouses and places of business in the State of California; that under the terms of the Alcoholic Beverage Control Act and of Rule 9, subdivision (a), promulgated thereunder and herinbefore set forth, plaintiffs and others similarly situated are required to obtain an importer's license for each of their several respective places of business, whereat plaintiffs import beer from outside the State of California.

XV

That there are approximately thirty-four breweries in the State of California and numerous wholesalers and distributors of beer brewed in the State of California which compete with plaintiffs and others similarly situated in the sale and distribution of beer in said State; that a large quantity of beer is brewed and manufactured in the State of California by said brewers, and said beer so manufactured in the State of California is competitive to the beer [fol. 135] manufactured in the State of Wisconsin and in the State of Missouri, as hereinabove alleged, and by plaintiffs and others similarly situated transported to California for sale in this State; that the prices at which beer so imported into the State of California may be sold at wholesale, as compared with prices at which the beer manufactured in the State of California may be sold at wholesale, is an item entering into the salability of such imported product; that the imposition of an importer's license at each of plaintiffs' said points of distribution and all such points of distribution belonging to others similarly situated is a direct charge upon the beer so imported and upon the prices at which said imported beer may be sold in the State of California, and is a discrimination and charge as against such beer so manufactured outside of the State of California and in favor of the beer manufactured within the State of California. That plaintiffs and others similarly situated have at their various branch stores and warehouses, as aforesaid, large sums of capital invested and used in the business heretofore conducted by them of distributing beer which they have imported from outside said state, which said investments will be greatly depreciated and rendered valueless if the provisions of the Alcoholic Beverage Control Act relating to said beer importer's license be enforced; inasmuch as the license fee of $500 imposed upon each place of business heretofore mentioned owned by plaintiffs and upon each such place of business owned by others similarly situated is an additional charge to plaintiffs and others similarly situated and an additional cost of said beer, plaintiffs and others similarly situated will be prevented from competing in the sale and distribution of beer, with beer manufactured in the State of California as to which no such license is required, and these

plaintiffs and others similarly situated will be forever excluded from the sale of imported beer at many of their [fol. 136] places of distribution, their business will be seriously impaired, their money, efforts and time in advertising their said businesses and the said imported beer and in creating a custom therefor will be lost, and plaintiffs and others similarly situated will thereby be deprived of their property, and the loss and damage that will be suffered by these plaintiffs and others similarly situated if said act, in so far as it refers to beer importers' licenses, be enforced, will be irreparable. Relying upon the provisions of the Constitution of the United States, plaintiffs and others engaged in the business of importing beer into the State of California, and similarly situated to the plaintiffs, have refused to apply for and obtain an importer's license for each of the various places of business at which plaintiffs and others so similarly situated import and receive beer; that defendants and each of them have threatened to, and unless restrained and enjoined by this court from so doing will enforce against plaintiffs and others similarly situated each and all of the provisions of said Alcoholic Beverage Control Act including the provisions thereof relating to beer importers' licenses.

XVI

That by reason of the favored position in which manufacturers of and wholesalers and dealers in beer manufactured in the State of California are placed under the provisions of said Act, plaintiffs and others similarly situated cannot sell beer so imported as hereinbefore set forth in the State of California at a reasonable or other profit, and, therefore, their business, to the extent hereinbefore mentioned, will be seriously impaired if not actually lost and destroyed; that the damage and loss which will be so suffered by plaintiffs and others similarly situated if the pro- [fol. 137] visions of said act relating to beer importers' licenses are enforced against them will be irreparable; that plaintiffs and others similarly situated are without any plain, adequate or speedy remedy at law in the premises and it is only by aid of the injunctive processes of this court that plaintiffs and others similarly situated can be fully protected in the enjoyment of their property and

rights; that the granting of a permanent injunction by this court against the enforcement of the provisions of the said Alcoholic Beverage Control Act relating to beer importers' licenses will prevent a multiplicity of suits and prosecutions which will arise in the event of any attempt to enforce the same; that the questions herein involved can only be determined by a court of equity in a proceeding of this nature.

Upon the foregoing findings of fact the court now makes and enters its conclusions of law as follows:

[fol. 138] CONCLUSIONS OF LAW

1st. That there exists in this suit the requisite amount in controversy for the jurisdiction of this court; that the questions involved herein arise under the Constitution of the United States; that this court has jurisdiction hereof, and that the jurisdiction of this court in equity is properly invoked.

2nd. That that certain act entitled "An Act to license, regulate and control the manufacture, transportation, sale, purchase, possession and disposition of alcoholic beverages; to levy an excise tax on the sale of alcoholic beverages; to provide for the licensing of the manufacture, distribution and sale of alcoholic beverages; to prescribe penalties for the violation of this act; to make an appropriation for the enforcement of this act; to take effect immediately, which said act is known and designated as Senate Bill No. 919, Chapter 330, Statutes of 1935, of the State of California, and is hereinafter denominated "Alcoholic Beverage Control Act," is invalid, void and unconstitutional in the particulars hereinafter stated and in so far as it contains the following provisions:

(1) Section 2, subsection (k) thereof, which reads:

"'Importer' means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the act of importation is completed."

in so far as said subsection refers to a person who imports, receives or possesses beer brought into the State of California from outside said State.

(2) Section 3 thereof, which reads:

"On and after July 1, 1935, no person shall perform any act or acts which would constitute such person a manufacturer, rectifier, importer, wholesaler, or retailer of any [fol. 139] alcoholic beverage within the meaning of this act or shall package, label or sell any alcoholic beverage unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act, or pursuant to the provisions of the State Liquor Control Act, Chapter 658, Statutes of 1933. Any person violating any provision of this section shall be guilty of a misdemeanor."

in so far as said section applies or refers to a beer importer's license or requires a beer importer's license of a person who imports, receives or possesses beer brought into the State of California from outside said State.

(3) That portion of Section 5 thereof reading as follows:

"The following are the types of licenses to be issued under this act and the annual fees to be charged therefor:

* * * * * * *

8. Beer importers license $500.00 per year

* * * * * * *"

in so far as it refers to "beer importers' license" and the fee to be charged therefor.

(4) That portion of Section 6 thereof reading as follows:

"Except as otherwise provided in this act and subject to the provisions of section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges and no others at the premises for which issued during the year for which issued.

* * * * * * *

(d) Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license and to export such alcoholic beverage.

* * * * * * *"

in so far as it refers to a person who imports, receives or possesses beer brought into the State of California from outside said State.

(5) That portion of Section 7 thereof reading as follows:

[fol. 140] "Each license issued under this act shall be issued to a specific person, and * * * shall be issued for a specific location, the principal address of which shall be indicated on the license. Separate licenses shall be issued for each of the premises of any business establishment having more than one location.

* * * * * * *

Each license issued under this act is separate and distinct, shall be nontransferable from one person to another, and shall be transferable from the premises for which issued only as may be permitted by the board, upon payment of a transfer fee of five dollars for each license.

* * * * * * *"

in so far as it applies to or refers to a beer importer's license for a person who is the first in possession of beer brought into the State of California from outside said State.

(6) Section 49 thereof, which reads:

"Common or private carriers shall transport alcoholic beverages into the State only when such alcoholic beverages are to be consigned to a licensed importer. The carrier must obtain the receipt of such importer for the alcoholic beverage so transported and delivered and, if the consignee refuses to give a receipt and show his importer's license to the carrier, the carrier shall be relieved of all responsibility for delivering said alcoholic beverage. Where the consignee is not a licensed importer the carrier shall immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and address of the consignor and consignee and within ten days such alcoholic beverage shall be summarily forfeited to the State of California and shall be turned over to the board for sale at public auction."

in so far as it refers to the transportation, importation, carriage or delivery of any beer into the State of California from outside said State, or the duties of any carrier in respect thereto, and in so far as it purports to provide for the forfeiture of any beer.

(7) Sections 10 and 11 of said act in so far as said sections refer to a beer importer's license for a person [fol. 141] who imports, receives or possesses beer brought into the State of California from outside said State.

(8) Section 31 of said act, in so far as said section applies to beer importers' licenses, or the license fee therefor.

3rd. That subdivisions (a), (b), (d) and (e) of Rule 9, promulgated by the defendant State Board of Equalization of the State of California, under and by virtue of the terms of such Alcoholic Beverage Control Act, which read as follows:

"(a) Importer's License Necessary.—The owner or purchaser of alcoholic beverages shipped into this State from outside this State must have an appropriate Importer's license for the premises at which such beverages first come to rest in this State after the act of importation is completed.

A licensee holding an importer's license for one premise may not have alcoholic beverages shipped to him from a point outside the State directly to another premise in this State for which he has not been issued an Importer's license.

Furthermore, the holder of an Importer's license may not take orders from wholesalers or retailers throughout the State and ship such beverages from outside the State direct to such wholesalers or retailers unless they hold appropriate Importers' licenses for each of the premises to which such beverages are consigned. Beverages may be shipped from points outside the State only to premises for which Importers' licenses have been issued. After the beverages have been delivered to the premises for which the consignee holds an Importer's license, he may, if he desires to do so, reship them to other premises for which

appropriate wholesale or retail licenses have been issued.

(b) Carriers Must Deliver Only to Licensed Importers.—No alcoholic beverages shall be transported into this State by any carrier, either common or private, unless consigned to a licensed importer. The carrier must obtain the receipt of such an importer for any beverages so transported, and if the carrier shall find that any shipment is consigned to, or intended for delivery to, anyone not a licensed importer, the beverages must not be delivered. In such case the car- [fol. 142] rier must immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and names and addresses of consignor and consignee; no such shipment shall be released by the carrier, except upon written order of the board.

(d) Mail Shipments Confined to Licensed Importers.—No alcoholic beverages shall be transported into this State by United States mail for delivery to anyone except a licensed importer. Postal authorities shall refuse delivery of any shipment of alcoholic beverages originating outside of this State unless the addressee can establish to their satisfaction that he is duly licensed by this board to receive such a shipment.

(e) Importer's License Does Not Authorize Sale.—Every licensed importer who proposes to bottle or prepare imported alcoholic beverages or to sell such beverages in this State must first obtain appropriate Manufacturer's and Wholesaler's or Retailer's licenses as provided in the Act. An Importer's license does not authorize bottling, preparation or resale of alcoholic beverages nor does any other license authorize importation of such beverages."

are invalid, void and unconstitutional in so far as the same apply to a person who imports, receives or possesses beer brought into the State of California from outside said State, or purport to limit the shipment or delivery of such beer to the holder of a beer importer's license.

4th. That the aforesaid provisions of the Alcoholic Beverage Control Act of the State of California impose discriminatory burdens upon plaintiffs herein and others similarly situated, on whose behalf this action is brought, in their business of importing into the State of California in

interstate commerce beer manufactured without said State; that said provisions of said act are not a valid exercise of the police powers of said State, but constitute unlawful burdens upon interstate commerce, in violation of the Constitution of the United States; that the plaintiffs and others similarly situated are entitled to injunctive relief [fol. 143] against the threatened enforcement of the aforesaid void and unconstitutional provisions of said act, and said regulations hereinbefore mentioned.

5th. That under the stipulation of the parties that the decree entered upon this hearing should be a final disposition of this cause, said injunction should be permanent, without bond; that the defendants State Board of Equalization of the State of California, John C. Corbett, Fred E. Stewart, R. E. Collins, Orfa Jean Shontz, Frank F. Merriam and U. S. Webb, and each of them, their respective appointees, assistants, employees, and successors in office, and each of them, should be enjoined and restrained from

(1) In any manner or in any way whatsoever enforcing against the plaintiffs and others situated similarly to plaintiffs, the provisions of the said Alcoholic Beverage Control Act, or the regulations issued thereunder, as hereinabove set out.

(2) From collecting or attempting to collect from plaintiffs, or any one of them, or from any person situated similarly to plaintiffs, the beer importer's license fee imposed by said act.

(3) From instituting or causing to be instituted any prosecution or proceeding, civil or criminal, against these plaintiffs, or any one of them, their officers, agents or employees, or any of them, or against any person situated similarly to plaintiffs, to enforce any of said provisions as hereinbefore described.

(4) From imposing or attempting to impose any of the penalties of said act for the failure of the plaintiffs or others similarly situated, to pay the beer importer's license fee required under said act.

[fols. 144 & 145] (5) From seizing or attempting to seize, selling or attempting to sell, any property of plaintiffs or

others similarly situated, for failure to pay said beer importer's license fee, or for failure to procure said beer importer's license, and from forfeiting or attempting to forfeit to the State of California any beer imported into the State of California, for failure of the consignee to pay said importer's license fee, or to procure said license.

(6) From interfering with or attempting to prevent any common or private carrier from transporting beer into the State of California for the sole reason that such beer may be consigned to a person who has not obtained such beer importer's license, and from interfering with or attempting to prevent any common or private carrier from delivering to such consignee beer which has been transported into the State of California and consigned to a person who does not have such beer importer's license, solely because of the lack of such license.

Dated this 9 day of October, 1935.

Curtis D. Wilbur, Judge of the United States Circuit Court of Appeals, Ninth Circuit; Hollzer, Judge of the United States District Court, Southern District of California, Central Division; Stephens, Judge of the United States District Court, Southern District of California, Central Division.

Approved as to form, as provided in Rule 44.

U. S. Webb, Attorney General, by Eugene M. Elson, Deputy.

[fols. 146 & 147] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. Eq. 736-H

YOUNG'S MARKET COMPANY, a Corporation; Simon Levi Company, Ltd., a Corporation; Haas Baruch & Company, of San Diego, a Corporation; W. L. Koerber, Doing Business under the Fictitious Firm-name and Style of Koerber Distributing Company, and George P. Higgins and George S. Higgins, Co-partners Doing Business under the Firm-name and Style of Higgins & Higgins, a Co-partnership, Plaintiffs,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; Frank F. Merriam, Governor of the State of California; U. S. Webb, Attorney General of the State of California; Ray L. Riley, John C. Corbett, Fred E. Stewart, R. E. Collins, Orfa Jean Shontz, George M. Stout and A. H. Flickinger, Defendants.

FINAL DECREE AND PERMANENT INJUNCTION.—Filed Oct. 9, 1935

The matter of the application of plaintiffs herein for an interlocutory injunction having come on regularly for hearing on the 4th day of September, 1935, at the hour of ten o'clock A. M., in the courtroom of the Honorable Harry A. Hollzer, on the third floor of the Federal Building, Los Angeles, California, before the Honorable Curtis D. Wilbur, Judge of the United States Circuit Court of [fol. 148] Appeals for the Ninth Circuit, the Honorable Harry A. Hollzer, Judge of the District Court of the United States, for the Southern District of California, Central Division, and the Honorable Albert Lee Stephens, Judge of the District Court of the United States, for the Southern District of California, Central Division, organized and sitting as a three-judge court under and by virtue of the provisions of Section 380 of the United States Code Annotated (Judicial Code, Section 266 as amended), for the hearing and determination of this cause, plaintiffs being represented and appearing by Baldwin Robertson and

William Larrabee, of their counsel, and defendants, Board of Equalization of the State of California, John C. Corbett, Fred E. Stewart, R. E. Collins, Orfa Jean Shontz, Frank F. Merriam, Governor of the State of California, and U. S. Webb, being represented and appearing by their counsel, U. S. Webb, Attorney General of the State of California, by Eugene M. Elson and Walter L. Bowers, Esquires, and the motion of said defendants for a dismissal of plaintiffs' complaint having also come on for hearing at said time and place and having been heard, and it being stipulated and agreed in open court by and between plaintiffs and said defendants, by and through their respective counsel of record, that plaintiffs' application for temporary injunction be heard upon plaintiffs' bill of complaint and the defendants' return to the order to show cause, verification of such return being waived by plain-
[fol. 149] tiffs, and it being likewise stipulated that further proof, hearing and argument upon plaintiffs' prayer for a permanent injunction be waived by the parties, and that the decree of the court entered upon this hearing should be a final disposition of this cause without the necessity of further hearing or proof upon the allegations of said bill; it being further stipulated that the issues for the determination of this court are of law and not of fact, the said defendants conceding that the allegations of plaintiffs' complaint having to do with or referring to the jurisdiction of this court as to the amount in controversy are true and correct, and the said defendants, by and through their counsel, having waived the grounds of their motion to dismiss plaintiffs' complaint and their return to the order to show cause in respect to the jurisdiction of this court as to the amount in controversy, and the court having announced its decision in favor of plaintiffs and against said defendants, and the court having heretofore made its findings of fact and conclusions of law herein, and being fully advised in the premises;

It is hereby Ordered, Adjudged and Decreed:

I

That that certain act entitled "An Act to license, regulate and control the manufacture, transportation, sale, purchase, possession and disposition of alcoholic beverages;

[fol. 150] to levy an excise tax on the sale of alcoholic beverages; to provide for the licensing of the manufacture, distribution and sale of alcoholic beverages; to prescribe penalties for the violation of this act; to make an appropriation for the enforcement of this act to take effect immediately, which said act is known and designated as Senate Bill No. 919, Chapter 330, Statutes of 1935, of the State of California, and is hereinafter denominated "Alcoholic Beverage Control Act," is invalid, void and unconstitutional in the particulars hereinafter stated and in so far as it contains the following provisions:

(1) Section 2, subsection (k) thereof, which reads:

"'Importer' means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the act of importation is completed."

in so far as said subsection refers to a person who imports, receives or possesses beer brought into the State of California from outside said State.

(2) Section 3 thereof, which reads:

"On and after July 1, 1935, no person shall perform any act or acts which would constitute such person a manufacturer, rectifier, importer, wholesaler, or retailer of any alcoholic beverage within the meaning of this act or shall package, label or sell any alcoholic beverage unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act, or pursuant to the provisions of the State Liquor Control Act, Chapter 658, Statutes of 1933. Any person violating any provision of this section shall be guilty of a misdemeanor."

[fol. 151] in so far as said section applies or refers to a beer importer's license or requires a beer importer's license of a person who imports, receives or possesses beer brought into the State of California from outside said State.

(3) That portion of Section 5 thereof, reading as follows:

"The following are the types of licenses to be issued under this act and the annual fees to be charged therefor:

* * * * * * *

8. Beer importers license $500.00 per year.

* * * * * * *"

in so far as it refers to "beer importers' license" and the fee to be charged therefor.

(4) That portion of Section 6 thereof reading as follows:

"Except as otherwise provided in this act and subject to the provisions of section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges and no others at the premises for which issued during the year for which issued.

* * * * * * *

(d) Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license and to export such alcoholic beverages.

* * * * * * *"

in so far as it refers to a person who imports, receives or possesses beer brought into the State of California from outside said State.

(5) That portion of Section 7 thereof reading as follows:

[fol. 152] "Each license issued under this act shall be issued to a specific person, and shall be issued for a specific location, the principal address of which shall be indicated on the license. Separate licenses shall be issued for each of the premises of any business establishment having more than one location.

* * * * * * *

Each license issued under this act is separate and distinct, shall be nontransferable from one person to another, and shall be transferable from the premises for which issued only as may be permitted by the board, upon payment of a transfer fee of five dollars for each license.

* * * * * * *"

in so far as it applies to or refers to a beer importer's license for a person who is the first in possession of beer

brought into the State of California from outside said State.

(6) Section 49 thereof, which reads:

"Common or private carriers shall transport alcoholic beverages into the State only when such alcoholic beverages are to be consigned to a licensed importer. The carrier must obtain the receipt of such importer for the alcoholic beverage so transported and delivered and, if the consignee refuses to give a receipt and show his importer's license to the carrier, the carrier shall be relieved of all responsibility for delivering said alcoholic beverage. Where the consignee is not a licensed importer the carrier shall immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and address of the consignor and consignee and within ten days such alcoholic beverage shall be summarily forfeited to the State of California and shall be turned over to the board for sale at public auction."

in so far as it refers to the transportation, importation, carriage or delivery of any beer into the State of California from outside said State, or the duties of any carrier [fol. 153] in respect thereto, and in so far as it purports to provide for the forfeiture of any beer.

(7) Sections 10 and 11 of said act in so far as said sections refer to a beer importer's license for a person who imports, receives or possesses beer brought into the State of California from outside said State.

(8) Section 31 of said act, in so far as said section applies to beer importers' licenses, or the license fee therefor.

II

That subdivisions (a), (b), (d) and (e) of Rule 9, promulgated by the defendant State Board of Equalization of the State of California, under and by virtue of the terms of such Alcoholic Beverage Control Act, which read as follows:

"(a) Importer's License Necessary.—The owner or purchaser of alcoholic beverages shipped into this State from outside this State must have an appropriate Importer's

license for the premises at which such beverages first come to rest in this State after the act of importation is completed.

A licensee holding an importer's license for one premise may not have alcoholic beverages shipped to him from a point outside the State directly to another premise in this State for which he has not been issued an Importer's license.

Furthermore, the holder of an Importer's license may not take orders from wholesalers or retailers throughout the State and ship such beverages from outside the State direct to such wholesalers or retailers unless they hold appropriate Importers' licenses for each of the premises [fol. 154] to which such beverages are consigned. Beverages may be shipped from points outside the State only to premises for which Importer's licenses have been issued. After the beverages have been delivered to the premises for which the consignee holds an Importer's license, he may, if he desires to do so, reship them to other premises for which appropriate wholesale or retail licenses have been issued.

(b) Carriers Must Deliver Only to Licensed Importers. —No alcoholic beverages shall be transported into this State by any carrier, either common or private, unless consigned to a licensed importer. The carrier must obtain the receipt of such an importer for any beverages so transported, and if the carrier shall find that any shipment is consigned to, or intended for delivery to, anyone not a licensed importer, the beverages must not be delivered. In such case the carrier must immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and names and addresses of consignor and consignee; no such shipment shall be released by the carrier except upon written order of the board.

(d) Mail Shipments Confined to Licensed Importers.— No alcoholic beverages shall be transported into this State by United States mail for delivery to anyone except a licensed importer. Postal authorities shall refuse delivery of any shipment of alcoholic beverages originating outside of this State unless the addressee can establish to

their satisfaction that he is duly licensed by this board to receive such a shipment.

(e) Importer's License Does Not Authorize Sale.—Every licensed importer who proposes to bottle or prepare imported alcoholic beverages or to sell such beverages in this State must first obtain appropriate Manufacturer's and Wholesaler's or Retailer's licenses as provided in the Act. An Importer's license does not authorize bottling, preparation or resale of alcoholic beverages nor does any other license authorize importation of such bevages."

[fol. 155] are invalid, void and unconstitutional in so far as the same apply to a person who imports, receives or possesses beer brought into the State of California from outside said state, or purport to limit the shipment or delivery of such beer to the holder of a beer importer's license.

III

That the defendants Board of Equalization of the State of California, John C. Corbett, Fred E. Stewart, R. E. Collins, Orfa Jean Shontz, Frank F. Merriam and U. S. Webb, and each of them, their respective appointees, assistants, employees and successors in office, and each of them, be and they are hereby permanently enjoined from in any way or manner whatsoever

(a) Enforcing against the plaintiffs and others situated similarly to plaintiffs, the provisions of the said Alcoholic Beverage Control Act, or the regulations issued thereunder, as hereinabove set out.

(b) Collecting or attempting to collect from plaintiffs, or any one of them, or from any person situated similarly to plaintiffs, the beer importer's license fee imposed by said act.

(c) Instituting or causing to be instituted any prosecution or proceeding, civil or criminal, against these plaintiffs, or any one of them, their officers, agents or employees, or any of them, or against any person situated similarly to plaintiffs, to enforce any of said provisions as herein-[fol. 156] before described.

(d) Imposing or attempting to impose any of the penalties of said act for the failure of the plaintiffs or others similarly situated, to pay the beer importer's license fee required under said act.

(e) Seizing or attempting to seize, selling or attempting to sell, any property of plaintiffs or others similarly situated, for failure to pay said beer importer's license fee, or for failure to procure said beer importer's license, and from forfeiting or attempting to forfeit to the State of California any beer imported into the State of California, for failure of the consignee to pay said importer's license fee, or to procure said license.

(f) Interfering with or attempting to prevent any common or private carrier from transporting beer into the State of California for the sole reason that such beer may be consigned to a person who has not obtained such beer importer's license, and from interfering with or attempting to prevent any common or private carrier from delivering to such consignee beer which has been transported into the State of California and consigned to a person who does not have such beer importer's license, solely because of the lack of such license.

Dated this 9 day of October, 1935.

[fol. 157-161]

Curtis D. Wilbur, Judge of the United States Circuit Court of Appeals, Ninth Circuit; Hollzer, Judge of the United States District Court, Southern District of California, Central Division; Stephens, Judge of the United States District Court, Southern District of California, Central Division.

Decree entered and recorded October 9, 1935.

R. S. Zimmerman, Clerk, by M. R. Winchell, Deputy Clerk.

[fols. 162-202] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

The foregoing petition is hereby granted and the appeal of the defendants, and each of them, is allowed upon giving

bond as required by law in the sum of Two Hundred Fifty Dollars ($250.00).

Dated, January 7, 1936.

Albert Lee Stephens, Judge of the United States District Court.

[fol. 203] IN SUPREME COURT OF THE UNITED STATES

ORDER ENLARGING TIME TO DOCKET CASE—Filed March 3, 1936

It appearing that the record on appeal in the above entitled matter has not been prepared for the reason that such record is not settled, and there being now pending in the District Court of the United States, for the Southern District of California, in the case from which this appeal is taken, an application by the above named appellees to settle a proposed statement of evidence on this appeal for the purpose of including the same in the record, and good and sufficient cause appearing therefor,

It is hereby ordered that the time within which to docket the above entitled case and to file the record on appeal thereof with the Clerk of the Supreme Court of the United [fol. 204] States may be enlarged to April 7th, 1936, and the above named appellants are hereby granted to and including April 7th, 1936, within which to docket the above entitled case with the Clerk of the Supreme Court of the United States and to file the record on appeal herein with the Clerk of said Court.

Dated, February 28th, 1936.

Albert Lee Stephens, Judge of the United States District Court, for the Southern District of California, and the Judge who signed the Citation herein.

[fol. 204½] [File endorsement omitted.]

[fols. 205-206] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—
Filed April 6, 1936

Come now the appellants in the above entitled cause and in support of their appeal hereby file their definite statement of the points on which they intend to rely and hereby state such points to be as follows:

That the District Court of the United States, for the Southern District of California, Central Division, and the special three-judge court organized and sitting therein erred:

1. In finding and holding that the Alcoholic Beverage [fol. 207] Control Act, Senate Bill No. 919, Chapter 330, pages 1123 to 1153 inclusive, Statutes of 1935 of the State of California, is invalid, void and unconstitutional in either or any and in each and all of the following particulars, terms and provisions thereof, and insofar as it contains either or any and each and all of the following provisions, to-wit:

(a) Section 2, subsection (k) thereof, which reads:

"'Importer' means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the act of importation is completed."

insofar as said subsection refers to a person who imports, receives or possesses beer brought in to the State of California from outside said State.

(b) Section 3 thereof, which reads:

"On and after July 1, 1935, no person shall perform any act or acts which would constitute such person a manufacturer, rectifier, importer, wholesaler, or retailer of any alcoholic beverage within the meaning of this act or shall package, label or sell any alcoholic beverage unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act, or pursuant to the provisions of the State Liquor Control Act, Chapter 658,

Statutes of 1933; any person violating any provisions of this section shall be guilty of a misdemeanor."

insofar as said section applies or refers to a beer importer's license or requires a beer importer's license of a person who imports, receives or possesses beer brought into the [fol. 208] State of California from outside said State.

(c) That portion of Section 5 thereof, reading as follows:

"The following are the types of licenses to be issued under this act and the annual fees to be charged therefor:

* * * * * * *

8. Beer importers license $500.00 per year

* * * * * * *"

insofar as it refers to "beer importers' license" and the fee to be charged therefor:

(d) That portion of Section 6 thereof reading as follows:

"Except as otherwise provided in this act and subject to the provisions of section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges and no others at the premises for which issued during the year for which issued.

* * * * * * *

(d) Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license and to export such alcoholic beverage.

* * * * * * *"

insofar as it refers to a person who imports, receives or possesses beer brought into the State of California from outside said State.

(e) That portion of Section 7 thereof reading as follows:

"Each license issued under this act shall be issued to a specific person, and * * * shall be issued for a specific [fol. 209] location, the principal address of which shall be indicated on the license. Separate licenses shall be issued

for each of the premises of any business establishment having more than one location.

* * * * * * *

Each license issued under this act is separate and distinct, shall be nontransferable from one person to another, and shall be transferable from the premises for which issued only as may be permitted by the board, upon payment of a transfer fee of five dollars for each license.

* * * * * * *"

insofar as it applies to or refers to a beer importer's license for a person who is the first in possession of beer brought into the State of California from outside said State.

(f) Section 49 thereof, which reads:

"Common or private carriers shall transport alcoholic beverages into the State only when such alcoholic beverages are to be consigned to a licensed importer. The carrier must obtain the receipt of such importer for the alcoholic beverage so transported and delivered and, if the consignee refuses to give a receipt and show his importer's license to the carrier, the carrier shall be relieved of all responsibility for delivering said alcoholic beverage. Where the consignee is not a licensed importer the carrier shall immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and address of the consignor and consignee and within ten days such alcoholic beverage shall be summarily forfeited to the State of California and shall be turned over to the board for sale at public auction."

insofar as it refers to the transportation, importation, carriage or delivery of any beer into the State of California from outside said State, or the duties of any carrier in respect thereto, and insofar as it purports to provide for [fol. 210] the forfeiture of any beer.

(g) Sections 10 and 11 of said Act insofar as said sections refer to a beer importer's license for a person who imports, receives or possesses beer brought into the State of California from outside said state.

(h) Section 31 of said Act, insofar as said section applies to beer importers' licenses, or the license fee therefor.

2. In finding and holding that subdivisions a, b, d, and e, or any or either of them, of Rule 9, promulgated by the State Board of Equalization of the State of California, under and by virtue of the terms of such Alcoholic Beverage Control Act, which read as follows:

"(a) Importer's License Necessary.—The owner or purchaser of alcoholic beverages shipped into this state from outside this state must have an appropriate Importer's license for the premises at which beverages first come to rest in this state after the act of importation is completed.

A licensee holding an importer's license for one premise may not have alcoholic beverages shipped to him from a point outside the state directly to another premise in this state for which he has not been issued an importer's license.

Furthermore, the holder of an importer's license may not take orders from wholesalers or retailers throughout the state and ship such beverages from outside the state direct to such wholesalers or retailers unless they hold appropriate importer's licenses for each of the premises to which such beverages are consigned. Beverages may be shipped from points outside the state only to premises for which importers' licenses have been issued. After the [fol. 211] beverages have been delivered to the premises for which the consignee holds an importer's license, he may, if he desires to do so, reship them to other premises for which appropriate wholesale or retail licenses have been issued.

(b) Carriers Must Deliver Only to Licensed Importers. —No alcoholic beverages shall be transported into this state by any carrier, either common or private, unless consigned to a licensed importer. The carrier must obtain the receipt of such an importer for any beverages so transported, and if the carrier shall find that any shipment is consigned to, or intended for delivery to, anyone not a licensed importer, the beverages must not be delivered. In such case the carrier must immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and names and ad-

dresses of consignor and consignee; no such shipment shall be released by the carrier, except upon written order of the board.

(d) Mail Shipments Confined to Licensed Importers.—No alcoholic beverages shall be transported into this state by United States mail for delivery to anyone except a licensed importer. Postal authorities shall refuse delivery of any shipment of alcoholic beverages originating outside of this state unless the addressee can establish to their satisfaction that he is duly licensed by this board to receive such a shipment.

(e) Importer's License Does Not Authorize Sale.—Every licensed importer who proposes to bottle or prepare imported alcoholic beverages or to sell such beverages in this state must first obtain appropriate Manufacturer's and Wholesaler's or Retailer's licenses as provided in the Act. An Importer's license does not authorize bottling, preparation or resale of alcoholic beverages nor does any other license authorize importation of such beverages."

are invalid, void and unconstitutional, and in so finding and holding as to either or any of said subdivisions, insofar as the same apply to a person who imports, receives or [fol. 212] possesses beer brought into the State of California from outside said state, or purport to limit the shipment or delivery of such beer to the holder of a beer importer's license.

3. In finding and holding that the aforesaid provisions of said Alcoholic Beverage Control Act of the State of California, or any or either of such provisions, impose any discriminatory burdens upon appellees (plaintiffs below) herein and others similarly situated in their business of importing into the State of California in interstate commerce beer manufactured without said state, and that the same constitute unlawful burdens upon interstate commerce in violation of the Constitution of the United States.

4. In finding and holding that the aforesaid provisions of the Alcoholic Beverage Control Act of the State of California, or any or either of them, are not a valid exercise of the police powers of said state.

5. In finding and holding that intoxicating liquors are not excepted from the provisions of the Commerce Clause (sec-

tion 8, article 1) and the Equal protection Clause (section 1, amendment 14) of the Constitution of the United States.

6. In finding and holding that the classification of importers under the statute in question as a class distinct from others engaged in the liquor business is unreasonable and [fol. 213] arbitrary and unlawfully discriminates between wholesalers of beer imported into the State of California, and wholesalers of beer manufactured in said state to the detriment of the former.

7. In finding and holding that the plaintiffs and others similarly situated were entitled to injunctive relief, and in granting and issuing a permanent injunction against the enforcement of the aforesaid provisions of said Alcoholic Beverage Control Act of the State of California and the aforesaid regulations issued thereunder, and any or either of them, by these appellants (defendants below), or any or either of them, or by any other person or persons.

8. In rendering and entering its final decree holding that the aforesaid provisions of the Alcoholic Beverage Control Act of the State of California, and the aforesaid regulations issued thereunder, and any or either of them, is invalid, void, and unconstitutional, and in issuing its permament injunction enjoining appellants, and each of them, from enforcing such provisions and regulations, or any or either of them, and from executing such provisions of said statute of the State of California.

9. In overruling and disallowing appellants' proposed amendment XIX to the findings and in thereby leaving in finding XV the words, and so finding as a fact "that the imposition of an importer's license at each of plaintiffs' (appellees here) said points of distribution and all such [fol. 214] points of distribution belonging to others similarly situated is a direct charge upon the beer so imported and upon the prices at which said imported beer may be sold in the state of California, and is a discrimination and charge as against such beer so manufactured outside of the state of California and in favor of the beer manufactured within the state of California."

10. In overruling and disallowing appellants' proposed amendment XX to the findings and in thereby leaving in finding XV the words, and so finding as a fact "and plain-

tiffs (appellees here) and others similarly situated will thereby be deprived of their property, and the loss and damage that will be suffered by these plaintiffs (appellees here) and others similarly situated if said Act, in so far as it refers to beer importers' licenses, be enforced, will be irreparable."

11. In overruling and disallowing appellants' proposed amendment XXI to the findings and in thereby leaving in finding XVI the words, and so finding as a fact "that the damage and loss which will be so suffered by plaintiffs (appellees here) and others similarly situated if the provisions of said Act relating to beer importers' licenses are enforced against them will be irreparable, that plaintiffs (appellees here) and others similarly situated are without any plain, adequate or speedy remedy at law in the premises and it is only by aid of the injunctive processes of this court that plaintiffs (appellees here) and others similarly situated can be fully protected in the enjoyment of their property and rights;".

[fol. 215] 12. In ordering, adjudging and decreeing that the Bill in Equity be sustained, and that an injunction issue against the appellants herein.

And appellants further state that only the following parts of the record, as filed in this court, need be printed by the clerk for the hearing of the cause:

Title of Paper	Record Page
Bill in Equity for Injunction	6- 75 inclusive
Motion for temporary restraining order and application for hearing for interlocutory injunction	77- 78 "
Return to order to show cause, restraining order and application for interlocutory injunction	91-101 "
Statement of evidence	103-105 "
Opinion	107-115 "
Special findings of fact and conclusions of law	117-144 "
Final decree and permanent injunction	147-157 "

U. S. Webb, Attorney General, by Walter Bowers, James S. Howie, Deputies Attorney General, Attorneys for Appellants.

Receipt of copy of the foregoing Statement is hereby acknowledged this 1st day of April, 1936.

Edwin A. Meserve, Meserve, Mumper, Hughes & Robertson, and M. J. Donnelly, by Edwin A. Meserve, Attorneys for Appellees.

[fol. 216] Appellees hereby waive any designation by them of additional parts of the record to be printed herein, and do hereby consent to the hearing of the above entitled cause on the foregoing parts of the record designated by appellants.

Dated April 1st, 1936.

Edwin A. Meserve and Meserve, Mumper, Hughes & Robertson, and M. J. Donnelly, by Edwin A. Meserve, Attorneys for Appellees.

[fol. 216½] [File endorsement omitted.]

[fol. 217] SUPREME COURT OF THE UNITED STATES

STIPULATION IN RE PRINTING OF RECORD—Filed June 25, 1936

It is hereby stipulated by and between the above named appellants and appellees, through their respective counsel of record herein that

Whereas the Alcoholic Beverage Control Act of the State of California (Chapter 330, Statutes 1935) has been heretofore printed in full in the Statement as to Jurisdiction filed herein, that the same need not be reprinted in the record on appeal herein but that wherever in such record the said act appears reference may be made thereto and the fact noted that the same appears in full in said Statement as to Jurisdiction, or in such other manner as the Clerk of the above entitled Court may designate.

Dated June 11, 1936.

U. S. Webb, Attorney General, by Walter Bowers, Eugene M. Elson, James S. Howie, Deputies, Attorneys for Appellants. Edwin A. Meserve, Attorney for Appellees.

[fol. 218] [File endorsement omitted.]

Endorsed on cover: File No. 40,411. D. C. U. S., S. California Term No. 22. State Board of Equalization of the State of California et al., Appellants, vs. Young's Market Company et al. Filed April 3, 1936. Term No. 22, O. T., 1936.

INDEX.

SUBJECT INDEX.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	2
State statute the validity of which is involved	2
Date of the decree sought to be reviewed and date of application for appeal	2
Nature of the case and rulings below	2
Cases believed to sustain the jurisdiction	3
Exhibit "1"	5

TABLE OF CASES CITED.

Brucker v. Fisher (6 C. C. A., Mich. 1931), 49 F. (2d) 759	3
Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co., 292 U. S. 386, 54 Sup. Ct. Rep. 732	3
Stratton v. St. Louis S. W. Railway Co., 292 U. S. 10, 51 Sup. Ct. Rep. 8, 75 L. Ed. 135	3

STATUTES CITED.

California Alcoholic Beverage Control Act (Senate Bill No. 919, Chapter 330, Statutes of 1935 of the State of California)	2
Constitution of the United States, Article 1, Section 8	3
14th Amendment, Section 1	3
United States Code, Title 28, Section 380 (Judicial Code, Section 266, as amended)	2, 4

IN THE

DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

IN EQUITY.

No. 736-H

YOUNG'S MARKET COMPANY, A CORPORATION, ET AL.,
Plaintiffs and Appellees,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA ET AL.,
Defendants and Appellants.

APPELLANTS' JURISDICTIONAL STATEMENT ON APPEAL.

To the Honorable Judges of the Above Entitled District Court of the United States:

The above named defendants and appellants and each of them, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause and

the final decree and permanent injunction therein on appeal and particularly disclosing the basis therefor, respectfully represent:

(a) That the statutory provision believed to sustain such jurisdiction is Section 380 of Title 28 of the United States Code Annotated (Judicial Code Sec. 266 as amended) and particularly the last clause thereof reading:

> "and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

(b) That the statute of the State of California, the validity of which is involved, is known as the Alcoholic Beverage Control Act, being Senate Bill No. 919, Chapter 330, Statutes of 1935 of the State of California, which said statute has not yet been paged in the official volume to be published of the 1935 Statutes of said State of California, and that a verbatim copy thereof is attached hereto, marked Exhibit 1, hereby referred to and made a part hereof.

(c) That the date of the final decree and permanent injunction sought to be reviewed is October 9, 1935, and that the date upon which the application for appeal herein is presented is January 7, 1936.

(d) The nature of the above entitled case was an application for an interlocutory and a permanent injunction restraining the defendants as the duly constituted officers of the State of California, from the enforcement and execution of all the provisions of said Alcoholic Beverage Control Act, a duly enacted statute of the State of California, relating and pertaining to importers of beer and the importation of beer, and to declare each and all of such provisions invalid, void and of no effect as being contrary

to and in violation of Section 8 of Article I of the Constitution of the United States and the Fourteenth Amendment to such Constitution. That upon the hearing of the application for the interlocutory injunction it was stipulated that the final decree might follow the same without further hearing and that the lower court ruled that such provisions violated the commerce clause (Section 8, Article I) and the equal protection clause (Section 1, Article XIV) of the Constitution of the United States, and that the fee imposed by said statute upon the importers of beer in the sum of Five Hundred ($500.00) Dollars is a direct and discriminatory burden upon interstate commerce and that the classification of beer importers is arbitrary and that the provisions created distinction "between the wholesalers of beer manufactured in California and those who sold beer imported into the State, with respect to the amount charged for the privilege of selling beer," and that "these provisions are in the nature of an economic barrier attempted to be established by legislation against competition with beer imported from other States—legislation, however, which contravenes the commerce clause and the equal protection clause of the Constitution of the United States."

(e) That the cases believed to sustain the jurisdiction of this appeal are as follows:

Oklahoma Gas & Elec. Co. v. *Oklahoma Packing Co.*, 292 U. S. 386, 390, 54 Sup. Ct. 732, 734;

Stratton v. *St. Louis S. W. Railway Co.*, 292 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 135;

Brucker v. *Fisher* (6 C. C. A. Mich. 1931), 49 F. (2d) 759.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of

Section 380, of Title 28 of the United States Code Annotated (Judicial Code, Section 266 as amended).

Respectfully submitted,

U. S. WEBB,
Attorney General;
By WALTER L. BOWERS.
EUGENE M. ELSON,
Deputies Attorney General,
Attorneys for Defendants and Appellants.

EXHIBIT "1".

Alcoholic Beverage Control Act of the State of California.

(Chapter 330, Statutes of 1935)

and

Related Constitutional Provisions.

Published Under Authority of

State Board of Equalization.

JOHN C. CORBETT, San Francisco ..... *First District*
FRED E. STEWART, Oakland ..... *Second District*
R. E. COLLINS, Redding ..... *Third District*
ORFA JEAN SHONTZ, Montrose ..... *Fourth District*
RAY L. RILEY, Chairman, Colton ..... *Controller*
DIXWELL L. PIERCE ..... *Secretary*
FRANK M. KEESLING ..... *Assistant Secretary*
GEORGE M. STOUT ..... *Liquor Control Administrator*

TABLE OF CONTENTS.

Constitutional Provisions.

	Page
Repeal of Eighteenth Amendment	8
State Control of Liquor Sales	8

Alcoholic Beverage Control Act.

§ 1. Short Title	10
§ 2. Definitions	10
§ 3. Licenses Required of Alcoholic Beverage Dealers	14
§ 4. Registration of Stills	14
§ 5. Types of Licenses; Fees	14
§ 6. Privileges Granted by Licenses	16
§ 7. Separate License for Each Premise; License Not Transferable; Duplicate Licenses	18
§ 8. Period for Which Licenses Issued; Penalty for Failure to Reapply	18

TABLE OF CONTENTS—Continued.

	Page
§ 9. Signing and Posting of Licenses	19
§ 10. Applications for Licenses	19
§ 11. Investigation of Applicant; Refund of Fee	20
§ 12. Citizenship Qualifications	20
§ 13. Premises Near Churches, Schools, etc.	20
§ 14. Restrictions on Issuance of Licenses Following Revocation	20
§ 15. Zoning Ordinances	21
§ 16. Restrictions on Issuance of On-Sale Licenses	21
§ 17. Public Works Camps	21
§ 18. Restrictions on Issuance of On-Sale Beer and Wine and Distilled Spirits Licenses	22
§ 19. Fruit Brandy Manufacturer's License	22
§ 20. Industrial Alcohol Dealer's License	22
§ 21. Posting Notice; Notice to Local Authorities	22
§ 22. Payment of Varying License Fees; Report of Sales	23
§ 23. Excise Tax on Beer and Wine	23
§ 24. Excise Tax on Distilled Spirits	24
§ 25. Bond of Beer and Wine Manufacturers and Importers	25
§ 26. Reports of Beer and Wine Manufacturers and Importers; Payment of Tax	27
§ 27. Examination of Records by Board	28
§ 28. Penalty for Refusal to Permit Examination	28
§ 29. Exemption of Sales to Another Manufacturer or Importer	28
§ 30. Exports; Export Certificates	29
§ 31. Collection Procedure; Lien of Tax	30
§ 32. Action to Recover Tax	33
§ 33. Distilled Spirits Excise Stamp	34
§ 34. Effective Date of Provisions Requiring Attaching of Stamps; Penalty for Failure to Attach	36
§ 35. Unlawful Sale of Stamps	37
§ 36. Counterfeiting or Fraudulent Use of Stamps	37
§ 37. Disposition of Funds Collected	38
§ 38. Board Authorized to Make Rules and Regulations	39
§ 39. Denial of Licenses	40

TABLE OF CONTENTS—Continued.

	Page
§ 40. Complaints Against Licensees	41
§ 41. Hearings Before Representative of Board	41
§ 42. Conduct of Hearings; Deposition of Witnesses	43
§ 43. Certification of Findings to Board	44
§ 44. Notice of Board's Decision	44
§ 45. Rehearing by Board	45
§ 46. Court Review of Board's Action	45
§ 47. Petition for Reconsideration Not a Bar to Review by Court	45
§ 48. Service of Notice	45
§ 49. Restriction on Deliveries by Common Carriers	45
§ 50. Postal Shipments	46
§ 51. Unlawful Possession; Power to Seize	46
§ 52. Restrictions on Sales in Public Barrooms	47
§ 53. Failure to File Reports; False Information	47
§ 54. Restrictions on Owning Interest in On-Sale Premises	47
§ 55. Restrictions on Use of Signs	49
§ 56. Employment of Minors Unlawful	50
§ 57. Employment of Hostesses and Entertainers on Percentage Basis Unlawful	51
§ 58. Disorderly Houses Unlawful	51
§ 59. Sales on Election Day Unlawful	51
§ 60. Restrictions as to Time of Making Wholesale Deliveries	51
§ 61. Sales to Minors Unlawful	52
§ 62. Sales to Habitual Drunkard Unlawful	52
§ 63. Restrictions on Bringing Alcoholic Beverage Into Jails, etc.	52
§ 64. Sales on Public School Grounds Unlawful	52
§ 65. Punishment for Misdemeanors; Disposition of Fines	53
§ 66. Punishment for Felony	53
§ 67. Act Not Applicable to Denatured Alcohol	53
§ 68. 1933 Liquor Control and Beverage Tax Acts Effective Until July 1, 1935	54
§ 69. Schedule of Laws Repealed	54
§ 70. Constitutionality	55
§ 71. Act Effective Immediately	55

United States Constitutional Amendment No. XXI.

Repeal of Eighteenth Amendment.

§ 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

§ 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by convention in the several States, as provided in the Constitution within seven years from the date of the submission hereof to the States by the Congress.

History.—This amendment to the Federal Constitution became effective December 5, 1933.

California Constitutional Amendment.

Article XX.

State Control of Liquor Sales.

Sec. 22. The State of California, subject to the Internal Revenue Laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the States shall have the exclusive right and power to regulate the importation into and exportation from the State, of intoxicating liquor. Intoxicating liquors, other than beers, shall not be consumed, bought, sold, or otherwise disposed of for consumption on the premises, in any public saloon, public bar or public barroom within the State; provided, however, that subject to the aforesaid restriction, all intoxicating liquors may be kept and may be bought, sold, served, consumed, and otherwise disposed of

in any bona fide hotel, restaurant, cafe, cafeteria, railroad dining or club car, passenger ship, or other public eating place, or in any bona fide club after such club has been lawfully operated for not less than one year. The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, and to collect license fees or occupation taxes on account thereof and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals. It shall be unlawful for any person other than a licensee of said board to manufacture, import or sell intoxicating liquors in this State. Until the Legislature shall otherwise provide, the privilege of keeping, buying, selling, serving, and otherwise disposing of intoxicating liquors in bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and in bona fide clubs after such clubs have been lawfully operated for not less than one year, and the privilege of keeping, buying, selling, serving, and otherwise disposing of beers on any premises open to the general public shall be licensed and regulated under the applicable provisions of the so-called State Liquor Control Act, California Statutes 1933, Chapter 658, in so far as the same are not inconsistent with the provisions hereof, and excepting that the license fee to be charged bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and any bona fide clubs after such clubs have been lawfully operated for not less than one year, for the privilege of keeping, buying, selling, or otherwise disposing of intoxicating liquors other than beers and wines, shall be $250.00 per year, or $62.50 per quarter annum for seasonal businesses, subject to the power of the State Board of Equalization to change such fees.

The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of liquor contained in the original packages, where such liquor is not to be consumed on the premises where sold.

The Legislature shall provide for apportioning the amounts collected for license fees or occupation taxes under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper.

All constitutional provisions and laws inconsistent with the provisions hereof are hereby repealed.

History.—On November 8, 1932, the people of the State of California repealed the Wright Act which enforced the provisions of the Eighteenth Amendment to the Constitution of the United States and the provisions of the Volstead Act. Section 22 was added to Article XX of the State Constitution at the same time.

On November 6, 1934, the people of the State of California adopted an amendment to section 22, Article XX of the State Constitution. This section in its present form is set forth above.

Alcoholic Beverage Control Act.

Chapter 330, Statutes of 1935.

[Approved by the Governor June 13, 1935.]

An act to license, regulate and control the manufacture, transportation, sale, purchase, possession and disposition of alcoholic beverages; to levy an excise tax on the sale of alcoholic beverages; to provide for the licensing of the manufacture, distribution and sale of alcoholic beverages; to prescribe penalties for the violation of this act; to make an appropriation for the enforcement of this act; to take effect immediately.

The people of the State of California do enact as follows:

§ 1. Short Title.

Section 1. This act is known and may be cited as the "Alcoholic Beverage Control Act."

§ 2. Definitions.

Sec. 2. The following words, terms and phrases when used in this act have the meanings ascribed to them in this

section, except where the context clearly indicates a different meaning:

(a) "Alcohol" means ethyl alcohol, hydrated oxide of ethyl, or spirits of wine, from whatever source or by whatever process produced.

(b) "Alcoholic beverage" means and includes alcohol, spirits, liquor, wine, beer and every liquid or solid containing alcohol, spirits, wine or beer, and which contains one-half of one per cent or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed or combined with other substances.

(c) "Beer" means any alcoholic beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops or any other similar product, or any combination thereof in water, and shall include ale, porter, brown, stout, lager beer, small beer and strong beer but shall not include sake known as Japanese rice wine.

(d) "Distilled spirits" means ethyl alcohol, spirits of wine, whiskey, rum, brandy, gin and other distilled spirits for beverage use, including all dilutions and mixtures thereof.

(e) "Wine" means the product obtained by the fermentation of grapes or other agricultural products containing natural or added sugar or any such alcoholic beverage fortified with grape brandy and containing not more than twenty-four per cent of alcohol by volume and shall include sake known as Japanese rice wine.

(f) "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number.

(g) "Board" means the State Board of Equalization of the State of California.

(h) "Club" means a corporation or association which is the owner, lessee or occupant of an establishment operated

solely for objects of a social or athletic nature, having a bona fide membership list, and the majority of the members of which pay dues at least once in every year, but not for pecuniary gain, and the property as well as the advantages of which belong to the members.

(i) "Manufacturer" means every person, who within the State of California, brews, ferments, distills, cuts, blends, rectifies, or otherwise processes, produces, or manufactures alcoholic beverages containing one-half of one per cent or more of alcohol by volume; provided that any person who manufactures not to exceed two hundred gallons of wine per year for his own consumption, shall not, because of such manufacture, be considered a manufacturer within the meaning of this act.

(j) "Rectifier" means every person who colors, flavors, or otherwise processes distilled spirits by distillation, blending, percolating or other processes.

(k) "Importer" means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the act of importation is completed.

(l) "Sell" or "sale" and the phrase "to sell" means and includes any of the following: to exchange, barter, traffic in; to solicit or receive an order for; to keep or expose for sale; to serve for a consideration with or without meals; to traffic in or deliver for value or in any way other than gratuitously; to possess with intent to sell. The transfer of title to alcoholic beverages unaccompanied by a transfer of possession of such beverages shall not be deemed a sale of such beverages.

(m) "Public bar" means any bar, counter or other structure over which beverages of an alcoholic content in excess of four per cent by weight are sold or served by the drink to the public for consumption on the premises; provided, however, that counters or other structures used for the sale, service and consumption of meals, and not as a subterfuge for a public bar, shall not be deemed to be a public bar within the meaning of this act. "Public barroom" or

"public saloon" means any room to which the public has access in which is maintained a "public bar."

(n) "Package" or "original package" means any container or receptacle used for holding alcoholic beverages which is corked or sealed with a stub, stopper or cap, or in any other manner.

(o) "To bottle" or "to package" means to bottle, barrel, or otherwise place alcoholic beverages in a container.

(p) "Distiller" means a manufacturer who produces distilled spirits from naturally fermented material.

(q) "Proof spirits" means that alcoholic liquor which contains one-half of its volume of pure ethyl alcohol of a specific gravity of 0.7939 at sixty degrees Fahrenheit, referred to water at sixty degrees Fahrenheit as unity.

(r) "Proof gallon" means a gallon of proof spirits, or an equivalent amount of alcohol.

(s) "Wholesaler" means and includes every person other than a manufacturer or rectifier who is engaged in business as a broker, jobber or wholesale merchant, dealing in alcoholic beverages.

(t) "Wholesale sale" or "sale at wholesale" means a sale to any person for purposes of resale.

(u) "Retailer's on-sale license" means and includes on-sale beer licenses, on-sale beer and wine licenses, and on-sale distilled spirits licenses.

(v) Gallon or "Wine gallon" means that liquid measure containing two hundred thirty-one cubic inches.

(w) "Wine manufacturer" means any person engaged in the manufacture of wine as the term "wine" is defined in this act.

(x) "Still" means a still used in the production or capable of being used in the production of alcoholic beverages and does not include stills or apparatus used solely in the production of distilled water or substances other than alcoholic beverages.

§ 3. Licenses Required of Alcoholic Beverage Dealers.

SEC. 3. On and after July 1, 1935, no person shall perform any act or acts which would constitute such person a manufacturer, rectifier, importer, wholesaler, or retailer of any alcoholic beverage within the meaning of this act or shall package, label or sell any alcoholic beverage unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act, or pursuant to the provisions of the State Liquor Control Act, Chapter 658, Statutes of 1933. Any person violating any provision of this section shall be guilty of a misdemeanor.

§ 4. Registration of Stills.

SEC. 4. On and after July 1, 1935, every still located within the limits of this State must be registered with the board. Every person owning or possessing a still who fails to register the same as herein required or who fails to obtain a license issued pursuant to the provisions of this act authorizing the ownership and possession of such still shall be guilty of a felony.

The board may seize and summarily destroy any still which is not registered or for which a license has not been obtained as required by this act.

§ 5. Types of Licenses; Fees.

SEC. 5. The following are the types of licenses to be issued under this act and the annual fees to be charged therefor:

1. Beer manufacturer's license	$750.00 per year
2. Wine manufacturer's license, one thousand gallons or less per year	5.00 per year
Over one thousand gallons to two thousand five hundred gallons per year	10.00 per year
Over two thousand five hundred gallons to five thousand gallons per year	20.00 per year
Over five thousand gallons to twenty thousand gallons per year	40.00 per year

Over twenty thousand to one hundred thousand gallons per year	75.00 per year
Over one hundred thousand to two hundred thousand gallons per year	100.00 per year
Over two hundred thousand gallons to one million gallons a year	150.00 per year
For each million gallons or fraction thereof over a million gallons an additional	100.00 per year
3. Distilled spirits manufacturer's license	250.00 per year
4. Still license	10.00 per year per still
5. Rectifier's license	250.00 per year
6. Fruit brandy manufacturer's license	150.00 per year
7. Distilled spirits and wine importers license	100.00 per year
8. Beer importer's license	500.00 per year
9. Wine bottling or packaging license	10.00 per year
10. Distilled spirits bottling or packaging license	250.00 per year
11. Beer bottling or packaging license	500.00 per year
12. Distilled spirits wholesaler's license	250.00 per year
13. Beer and wine wholesaler's license	50.00 per year
14. Retail package off-sale beer and wine license	10.00 per year
15. Retail package off-sale distilled spirits license for the first $10,000 retail sales per year	100.00 per year
For each $1,000 retail sales or fraction thereof over $10,000 per year	10.00 per year
16. Industrial alcohol dealer's license	50.00 per year
17. On-sale beer license	25.00 per year
18. On sale beer and wine license	75.00 per year
19. On sale beer and wine license for trains (per train)	15.00 per year
20. On sale beer and wine license for boats (per boat)	50.00 per year
21. On sale distilled spirits license	As set by the board.

The fees specified above shall be reduced twenty-five per cent for each full quarter of a year elapsing between the first day of the year for which the license is issued and the date on which the application for the license is filed with the board; provided, that where an application clearly indicates that the applicant does not desire to exercise the privileges granted by the license applied for until on or after the beginning of the quarterly period following the quarterly period in which the application is filed with the board, such fees shall be reduced twenty-five per cent for each full quarter of a year elapsing between the first day of the year for which the license is issued and the date so indicated in the application.

Where the fee for any license is graduated according to the amount of alcoholic beverages manufactured or sold under the license, and the license is applied for after the beginning of the year, the amount of alcoholic beverage authorized to be manufactured or sold under the license shall be reduced proportionately with the reduction in fee provided in the preceding paragraph in accordance with such rules and regulations as the board may prescribe.

§ 6. Privileges Granted by Licenses.

SEC. 6. Except as otherwise provided in this act and subject to the provisions of section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges and no others at the premises for which issued during the year for which issued.

(a) Any manufacturer's license authorizes the person to whom issued to become a manufacturer of the alcoholic beverage specified in the license, to package, mix, flavor and color and label the same and to export or sell such alcoholic beverages to persons holding licenses issued by the board authorizing the sale of such alcoholic beverage; provided that a wine manufacturer's license authorizes the manufacture of grape brandy to be used exclusively for fortifying purposes by its holder on the premises for which issued.

(b) A still license authorizes the person to whom issued to own or possess the number of stills indicated in the license upon the premises for which issued.

(c) A rectifier's license authorizes the person to whom issued to cut, blend, mix, flavor, color and bottle distilled spirits and to export or sell such products to persons holding licenses issued by the board authorizing the sale of distilled spirits.

(d) Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license and to export such alcoholic beverage.

(e) A bottling or packaging license authorizes the labeling, bottling or packaging of the alcoholic beverages specified in the license.

(f) Any wholesaler's license authorizes the sale of the alcoholic beverage specified in the license only to persons holding licenses issued by the board authorizing the sale of such alcoholic beverage.

(g) An off-sale beer and wine license authorizes the sale, to consumers only and not for resale, of beer in packages and in quantities of thirty-one gallons or less, per sale and the sale of wine in packages and in quantities of fifty-two gallons or less, per sale for consumption off the premises where sold.

(h) An off-sale distilled spirits license authorizes the sale, to consumers only and not for resale, of distilled spirits in quantities of less than five gallons per sale and in packages of one gallon or less for consumption off the premises where sold.

(i) An industrial alcohol dealer's license authorizes the sale of undenatured ethyl alcohol or other distilled spirits in packages of more than one gallon for use in the trades, professions or industries.

(j) Any on-sale license authorizes the sale of the alcoholic beverage specified in the license for consumption on the premises where sold. An on-sale beer and an on-sale beer

and wine license also authorizes the exercise, with respect to the particular beverage or beverages mentioned in such license, of the rights and privileges granted by an off-sale beer and wine license. On trains and boats, under such licenses, alcoholic beverages may be sold only to passengers or employees.

§ 7. Separate License for Each Premise; License not Transferable; Duplicate Licenses.

SEC. 7. Each license issued under this act shall be issued to a specific person, and, except in the case of licenses authorizing the sale of alcoholic beverages on trains or boats, shall be issued for a specific location, the principal address of which shall be indicated on the license. Separate licenses shall be issued for each of the premises of any business establishment having more than one location.

Licenses for trains and boats shall be based on the average number in actual operation, during the license year, of each class of operating units, viz, trains and boats upon which the license privileges are exercised, such average number to be determined as the board may prescribe.

Each license issued under this act is separate and distinct, shall be nontransferable from one person to another, and shall be transferable from the premises for which issued only as may be permitted by the board, upon payment of a transfer fee of five dollars for each license.

Whenever a license certificate issued under the act is lost or destroyed, the board shall issue a duplicate license upon the payment of a fee of five dollars.

§ 8. Period for Which Licenses Issued; Penalty for Failure to Reapply.

SEC. 8. All retailer's on-sale licenses shall be issued on a calendar year basis and shall automatically expire at midnight on the last day of December of the year for which issued. All other licenses issued under this act shall be issued on the basis of a fiscal year commencing July first and ending June thirtieth, and shall automatically expire at midnight on the last day of June of the year for which issued.

All licenses issued under the provisions of the State Liquor Control Act, Chapter 658, Statutes of 1933, which authorize the sale of liquor specified in the licenses for consumption on the premises shall automatically expire at midnight on December 31, 1935.

All other licenses issued under said act and all licenses issued under the provisions of Chapter 178, Statutes of 1933, shall automatically expire at midnight on June 30, 1935. One-half the annual fee for any license so expiring at midnight on June 30, 1935, shall be allowed as a credit against the fee for any comparable license issued under this act during 1935.

For failure to reapply for a license prior to the time when any license expires, the board may by regulation prescribe that in addition to the license fees specified in section 5 hereof a penalty of not to exceed twenty-five per cent of such fees must be paid.

§ 9 Signing and Posting of Licenses.

SEC. 9. Upon receipt of any license issued hereunder the licensee shall sign said license and shall post the license in a conspicuous place upon the licensed premises. Licenses issued for trains or boats may, in lieu of being posted upon the train or boat for which issued, be posted in such other place in this State as the board shall designate.

§ 10. Applications for Licenses.

SEC. 10. To obtain a license under this act application therefor, accompanied by the license fee therefor, must be made to the board upon a form prescribed by the board. The application must contain the name of the applicant, and in the case of a copartnership, the names of the individual parties, in the case of a corporation the principal officers and directors, the location of the premises for which a license is applied and such other information as the board may require to assist it in determining whether the applicant and the premises qualify for a license. The board may require that the application for any on-sale license be verified under oath and be endorsed by five freeholders or

householders of the city or county in which the applicant resides or the premises are located.

§ 11. Investigation of Applicant; Refund of Fee.

SEC. 11. Upon receipt of an application for a license and the license fee the board shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license. The board must deny an application for a license if either the applicant or the premises for which a license is applied do not qualify for a license under this act.

If an application is denied, three-fourths of the license fee paid, or an amount equal to the license fee paid less ten dollars, whichever is greater, shall be returned to the applicant and the balance shall be deposited in the alcoholic beverage control fund hereinafter created.

§ 12. Citizenship Qualifications.

SEC. 12. No on-sale distilled spirits license shall be issued to any applicant who is not a citizen of the United States; and where a corporation, partnership or other business association is the applicant no such license shall be issued to it unless the majority of the members of the board of directors and all of its officers who are charged with the duty of managing, directing or conducting said business, are citizens of the United States.

§ 13. Premises Near Churches, Schools, etc.

SEC. 13. The board is specifically authorized to refuse the issuance of on-sale retail licenses for premises located within the immediate vicinity of churches, hospitals, schools and children's public playgrounds.

§ 14. Restrictions on Issuance of Licenses Following Revocation.

SEC. 14. No retail license shall be issued to any applicant for any premises for which a license has been forfeited, or revoked, during the three months immediately preceding the filing of such application.

§ 15. Zoning Ordinances.

SEC. 15. No retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county, city and county or municipality unless such premises had been used in the exercise of such rights and privileges at a time prior to the effective date of any such valid zoning ordinance.

Nothing in this act contained shall be deemed to interfere with the powers of cities, counties, and cities and counties, conferred upon them by Chapter 734, Statutes of 1917, the same being an act of the Legislature entitled, "An act to provide for the establishment within municipalities of districts or zones within which the use of property, height of improvements and requisite open spaces for light and ventilation of such buildings, may be regulated by ordinance."

§ 16. Restrictions on Issuance of On Sale Licenses.

SEC. 16. No retailer's on-sale license shall be issued to any person to whom or for any premises for which a manufacturer's, importer's, wholesaler's or rectifier's license shall have been issued, and no manufacturer's, importer's, wholesaler's or rectifier's license shall be issued to any person to whom or for any premises for which a retailer's on-sale license is issued.

§ 17. Public Works Camps.

SEC. 17. No license shall be issued to any applicant for any premises situated more than one mile outside the limits of an incorporated city or town and within four miles of any camp or establishment of men numbering twenty-five or more, engaged upon or in connection with the construction, repair or operation of any work, improvement or utility of a public or quasi public character; provided, however, that nothing in this section shall be deemed to apply to the renewal of any licenses for any premises which have been established and licensed under this act or

under the State Liquor Control Act, Chapter 658, Statutes of 1933 at least six months prior to the establishment of such camp or establishment of men.

§ 18. Restrictions on Issuance of On Sale Beer and Wine and Distilled Spirits Licenses.

SEC. 18. Retailer's "on-sale beer and wine licenses" or "on-sale distilled spirits licenses" shall be issued only to bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships or other public eating places, or bona fide clubs after such clubs have been lawfully operated for not less than one year.

§ 19. Fruit Brandy Manufacturer's License.

SEC. 19. Fruit brandy manufacturer's licenses shall be issued only to persons holding a wine manufacturer's license.

§ 20. Industrial Alcohol Dealer's License.

SEC. 20. Industrial alcohol dealers' licenses shall be issued only to persons to whom, and for premises, for which, either a distilled spirits manufacturer's, importer's or wholesaler's license has been issued.

§ 21. Posting Notice; Notice to Local Authorities.

SEC. 21. Before commencing to engage in the sale of any alcoholic beverage at any premises, notice of intention to so commence, must be posted in a conspicuous place at the entrances to such premises. Licenses will not be issued for such premises until such notice has been so posted for fifteen consecutive days immediately prior to the issuances of the licenses. The notice herein specified shall be in such form as the board shall prescribe.

Upon the receipt by the board of an original application for any license, notice thereof shall immediately be given by said board to the sheriffs, chiefs of police and district attorneys of such locality, and to the city clerks and city planning commissions in such locality upon request.

§ 22. Payment of Varying License Fees; Report of Sales.

SEC. 22. In the case of any applicant whose license fee varies with the total amount of alcoholic beverages manufactured or sold, the applicant shall at the time of filing application for license, accompany such application with the minimum license fee required, or such larger fee as the applicant shall elect.

The licensee shall report quarterly at such time and in such manner as the board may prescribe, the amount of alcoholic beverages manufactured or sold during the preceding quarter.

If any such report shows that the total amount of alcoholic beverages manufactured or sold during the year exceeds the amount permitted annually by the license fee already paid the board, the licensee shall accompany such report with such additional license fee as shall authorize him to continue to manufacture or sell additional amounts of alcoholic beverages in accordance with the schedule provided in section 5.

Failure to report the amount of alcoholic beverages manufactured or sold as herein required and to pay such additional license fees when due within ten days of the date set by the board, shall be considered a violation of this act, and shall also subject the licensee to an arbitrary assessment of such license due by the board.

Failure to make a final report and payment of any license due at the end of any tax year shall operate to prevent the board from issuance of any license to any delinquent licensee.

§ 23. Excise Tax on Beer and Wine.

SEC. 23. An excise tax is hereby imposed upon all beer and wine sold in this State by a manufacturer or importer on or after July 1, 1935, at the following rates:

(a) On all beer, sixty-two cents for every barrel containing thirty-one gallons, and at a proportionate rate for any other quantity;

(b) On all wine, two cents per wine gallon, and at a proportionate rate for any other quantity;

(c) On champagne, or sparkling wine, whether naturally or artificially carbonated, three cents per pint or fraction thereof.

Beer and wine consumed by employees of manufacturers or importers upon the premises of such manufacturers and importers shall be exempt from tax under such rules and regulations as the board may prescribe.

It shall be presumed, for the purposes of this act, that all beer and wine produced, brewed, fermented, or manufactured in this State by a manufacturer, or delivered to a manufacturer or importer here, has been sold by such manufacturer or importers unless proven to the satisfaction of the board that such beverages are still in the possession of such manufacturer or importer, or, prior to the termination of such possession, have been lost through evaporation, leakage, spillage or destruction by the elements.

§ 24. Excise Tax on Distilled Spirits.

SEC. 24. An excise tax is hereby imposed upon all distilled spirits sold in this State on and after July 1, 1935, at the following rates:

On all distilled spirits of proof strength or less, two cents on each bottle containing two ounces or fraction thereof; five cents on each bottle containing eight ounces or fraction thereof greater than two ounces; ten cents on each bottle containing one pint or fraction thereof greater than a half pint; sixteen cents on each bottle containing one-fifth gallon or fraction thereof greater than one pint; twenty cents on each bottle containing one quart or fraction thereof greater than one-fifth gallon; forty cents on each bottle containing one-half gallon or fraction thereof, greater than one quart; eighty cents on each bottle containing one gallon or fraction thereof greater than one-half gallon.

All distilled spirits in excess of proof strength shall be taxed at double the above rate.

§ 25. Bond of Beer and Wine Manufacturers and Importers.

SEC. 25. Every person who engages in business as, or becomes a manufacturer or importer of beer or wine, as de-

fined in this act, shall be required by the board to file with said board a bond duly executed by such person as principal and a corporation such as is mentioned in section 1056 of the Code of Civil Procedure in this State, as surety, payable to the people of the State of California, conditioned upon the payment of all excise taxes and penalties assessed against or imposed upon such person, arising out of this act.

The bond shall contain the provisions and be in the form substantially as follows:

"Know all men by these presents:

That we, ——, as principal, and —— a corporation, duly organized and doing business under and by virtue of the laws of ——, and duly licensed for the purpose of making, guaranteeing or becoming sole surety upon bonds or undertakings required or authorized by the laws of the State of California, as surety, are held and firmly bound unto the people of the State of California in the sum of — dollars ($—), lawful money of the United States of America, for the payment whereof well and truly to be made, we bind ourselves, our heirs, executors, successors and assigns, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that,

Whereas, the above bounden principal has made application to the State Board of Equalization of the State of California for a license authorizing said principal to engage in business as a manufacturer or importer of beer or wine within the meaning of the Alcoholic Beverage Control Act and amendments thereto, and

Whereas, under the terms of said act a bond is required of said principal and good and sufficient surety, payable to the people of the State of California, conditioned upon the payment to the State of California of all of the excise taxes and penalties assessed against or imposed upon said principal arising out of said act.

Now therefore, if the above bounden principal shall pay all excise taxes and penalties assessed against or imposed upon said principal arising out of said act, or if the board, within thirty days after any default by said principal in

the payment of any such tax or penalty shall fail to notify the surety thereof, personally or by mail, then this obligation shall be null and void: otherwise to remain in full force and effect.

That said bond shall remain in force and effect until the surety or sureties are released from liability by said board or until said bond is canceled by said surety or sureties as hereinafter provided.

The surety herein reserves the right to withdraw as such surety, except as to any liability already incurred or accrued hereunder, and may do so upon giving written notice of such withdrawal to the State Board of Equalization; provided, however, that no withdrawal shall be effective for any purpose until thirty days shall have elapsed from and after receipt of such notice by said board; and further provided, that no withdrawal shall in anywise affect the liability of said surety arising out of any sale of beverage made by the principal herein prior to the expiration of such period of thirty days, regardless of whether or not the excise tax based upon such sale shall have been due prior to the expiration of such period.

Signed and sealed this — day of ——, 193-.

——— ———,
Principal.

By ——— ———.

——— ———,
Surety.

By ——— ———."

The total amount of the bond or bonds required of any such manufacturer or importer shall be fixed by the board and may be increased or reduced by said board at any time subject to the limitations herein provided. In fixing the total amount of the bond or bonds required of any such manufacturer or importer, the board must require a bond or bonds equivalent in total amount to one and one-half times his estimated monthly excise tax determined in such manner as said board may deem proper; provided, that the total amount of the bond or bonds required of any such

manufacturer or importer shall never be less than five hundred dollars.

§ 26. Reports of Beer and Wine Manufacturers and Importers; Payment of Tax.

SEC. 26. Every manufacturer or importer of alcoholic beverages taxable under this act shall render to the board on or before the tenth day of August, 1935, and on or before the tenth day of each month thereafter, a verified statement of the quantity of such alcoholic beverage sold by such manufacturer or importer during the preceding calendar month. Such statement shall be in such form as the board may prescribe, together with such other information as the board may require.

If any manufacturer or importer shall fail, neglect or refuse to file said report, within the time prescribed for filing such report, the board must note such failure, neglect or refusal upon the tax roll hereinafter described, and must estimate the amount of alcoholic beverage sold by said manufacturer or importer assessing the excise tax thereon, adding to said excise tax a penalty of fifteen per cent thereof for failure, neglect, or refusal to report. Such action of the board shall be final, and subject only to review by a court of competent jurisdiction.

The board shall, on or before the twenty-second day of August, 1935, and on or before the twenty-second day of each calendar month thereafter, assess the excise tax due hereunder, and prepare and complete an assessment roll showing the amount of the excise tax assessed against each manufacturer and importer and immediately deliver said assessment roll to the State Controller.

Excise taxes herein required to be paid by the manufacturer or importer shall be payable in monthly installments to the State Controller for the month ending July 31, 1935, and for each and every calendar month thereafter. The amount of such excise tax for each month shall be paid on or before the tenth day of the second calendar month thereafter, and if not paid prior thereto, shall become delinquent at five o'clock in the afternoon of said day, and ten per cent penalty shall be added thereto for delinquency.

§ 27. Examination of Records by Board.

SEC. 27. The board may examine the books and records of any person required to make said statement, and may also examine the books and records of any licensee as herein defined, and such books and records shall at all times be subject to the inspection of said board or its representatives during regular business hours.

If any examinations or investigations made by the board shall disclose that any reports of manufacturers or importers theretofore filed with said board by said manufacturers or importers pursuant to the requirements of this act, have shown incorrectly the amount of alcoholic beverage sold or the excise tax accruing thereon, said board shall have the power and is hereby authorized, to make such changes in subsequent assessments of said manufacturers or importers under this act as it may deem necessary to correct the errors disclosed by its examination of the records of said manufacturers or importers or its investigations in pursuance of its powers hereunder.

§ 28. Penalty for Refusal to Permit Examination.

SEC. 28. Any person refusing to permit the board or any of its representatives to make the inspection for which provision is made in the preceding section or failing to keep books of account as may be prescribed by the board or failing to preserve such books for the inspection of the board for such time as the board may deem necessary, and any person altering, canceling or obliterating entries in such books of account for the purpose of falsifying the records of sales of alcoholic beverages made under this act shall be guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment.

§ 29. Exemption of Sales to Another Manufacturer or Importer.

SEC. 29. No excise tax shall be imposed by this act in any transaction whereby any alcoholic beverages are sold and

delivered by a manufacturer or importer to another manufacturer or importer holding a valid manufacturer's or importer's license.

In order to obtain the exemption granted under this section, the manufacturer or importer selling alcoholic beverages must present to the board at the time of filing his monthly report required under section 26, a verified statement, in a form to be prescribed by the board, obtained from the purchaser showing the date, kind and quantity of alcoholic beverage sold and delivered to the purchaser, that the purchaser holds at the time of such purchase, a manufacturer's or importer's license, the number of such license, and such other information as the board may require. A copy of this statement must at all times be kept on file at the place of business of the manufacturer or importer desiring to obtain the exemption herein granted.

§ 30. Exports; Export Certificates.

SEC. 30. None of the provisions of this act shall apply, or be construed to apply, to commerce with foreign Nations or commerce with the several States, except in so far as the same may be permitted under the provisions of the Constitution and laws of the United States nor shall the excise tax imposed by section 23, of this act apply to alcoholic beverages sold and actually exported from this State by a licensed manufacturer or importer, or by a subsidiary of a licensed manufacturer or importer, but every manufacturer and importer shall be required to report such exports to the board in such detail as the board may require, otherwise the exemption herein granted shall be null and void and such alcoholic beverage shall be considered sold in this State subject fully to the provisions of this act.

In support of any exemption from excise taxes claimed under this section on account of the exportation of alcoholic beverage every manufacturer must execute an export certificate in such form as shall be prescribed, prepared and furnished by the board containing a sworn statement made by some person having knowledge of the fact of such exportation that the alcoholic beverage has been exported from this State, and giving such detail with reference to

shipment as said board may require. All exportation certificates must be completed and on file in the office of the board within thirty days after the close of the calendar month in which the shipments were made and no certificate not completed and filed within such period shall be recognized for any purpose by the State or any agency thereof. The board may demand of any manufacturer or importer such additional data as is deemed necessary by said board in support of any such certificate and failure to supply such data will constitute waiver of all right to exemption claimed by virtue of said certificate.

§ 31. Collection Procedure; Lien of Tax.

SEC. 31. In any case in which any tax, interest or penalty imposed under this act is not paid when due the Controller shall notify the board and may file in the office of the county clerk of Sacramento County or any other county a certificate specifying the amount of the tax, interest and penalty due, the name and last known address of the manufacturer or importer liable for the same, that the board has complied with all the provisions of this act, in relation to the computation and levy of the tax and a request that judgment be entered against the manufacturer or importer in the amount of the tax, interest and penalty set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment for the people of the State of California against the manufacturer or importer in the amount of the tax, interest and penalty set forth in the certificate. The judgment may be filed by the county clerk in a loose-leaf book entitled "Special Judgments for State Excise Tax.".

An abstract of such judgment or a copy thereof may be recorded with the county recorder of any county and from the time of such recording, the amount of the taxes, interest and penalty therein set forth shall constitute a lien upon all the real property of the manufacturer or importer in such county, owned by him or which he may afterwards and before the lien expires acquire, which lien shall have the force, effect and priority of a judgment lien. Execution shall issue upon such a judgment upon the request of the

Controller in the same manner as execution may issue upon other judgment and sales shall be held under such execution as prescribed in the Code of Civil Procedure. In all proceedings under this section the Controller shall be authorized to act on behalf of the people of the State of California.

In the event that any manufacturer or importer is delinquent in the payment of the excise tax herein provided for, the Controller shall notify the board forthwith and may give notice of the amount of such delinquency by registered mail to all persons having in their possession or under their control, any credits or other personal property belonging to such manufacturer or importer, or owing any debts to such manufacturer or importer, at the time of receipt by them of such notice, and thereafter any person so notified shall neither transfer nor make other disposition of such credits, other personal property or debts until the Controller shall have consented to a transfer or disposition, or until twenty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice, advise the Controller of any and all such credits, other personal property or debts, in their possession under their control or owing by them, as the case may be.

Whenever any manufacturer or importer shall be delinquent in the payment of the excise tax herein provided for, the Controller or his duly authorized representative may proceed forthwith to collect the excise tax due from such manufacturer or importer in the following manner: The Controller shall seize any property, real or personal, of the taxpayer, and thereafter sell at public auction such property so seized, or a sufficient portion thereof, to pay the excise tax due hereunder, together with any penalty or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent manufacturer or importer and to all persons appearing of record to have an interest in such property, in writing at least

ten days before the date set for such sale by inclosing such notice in an envelope addressed to said manufacturer or importer at his last known residence or place of business in this State if any, and, depositing same in the United States registered mail, postage prepaid, and by publication for at least ten days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided, however, that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county for said ten days period. The said notice shall contain a description of the property to be sold, together with a statement of the amount of the excise taxes, penalties and costs, the name of the manufacturer or importer and the further statement that, unless such excise taxes, penalties and costs are paid on or before the time fixed in said notice for such sale, said property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

At any such sale, the property shall be sold by the Controller or by his duly authorized agent in accordance with law and said notice, and the Controller shall deliver to the purchaser a bill of sale for the personal property, and a deed for any real property so sold, and such bill of sale or deed shall vest title in the purchaser subject to a right of redemption as prescribed in the Code of Civil Procedure upon sales of real estate on execution. The unsold portion of any property so seized may be left at the place of sale at the risk of the manufacturer or importer. If, upon any such sale, the moneys so received shall exceed the amount of all license taxes, penalties and costs due the State from such manufacturer or importer, any such excess shall be returned to the manufacturer or importer, and his receipt therefor obtained; provided, however, that if any person having an interest in or lien upon the property has filed with the Controller prior to any such sale notice of such interest said Controller shall withhold any such excess pending a determination of the rights of the respective parties thereto by a court of competent jurisdiction. If,

for any reason, the receipt of such manufacturer or importer shall not be available, the Controller shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such manufacturer or importer, his heirs, successors or assigns.

The Controller must also immediately transmit notice of such delinquency to the Attorney General who shall at once proceed to collect all sums due to the State from any such manufacturer or importer hereunder by bringing suit against the necessary parties to effect forfeiture of the bond or bonds of the manufacturer or importer, reducing any deficiency to judgment against the manufacturer or importer.

It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board, Controller or Attorney General shall be or be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act.

In any suit brought to enforce the rights of the State hereunder the assessment roll prepared by the board pursuant to section 26 of this act, or a copy of so much thereof as is applicable in such suit, duly certified by the Controller showing unpaid excise taxes assessed against any manufacturer or importer, shall be prima facie evidence of the assessment of the excise tax, the delinquency thereof, the amount of the excise tax, penalties and costs due and unpaid to the State, that the manufacturer or importer is indebted to the people of the State of California in the amount of such excise tax and penalties therein appearing unpaid and that all the forms of law in relation to the assessment and levy of such excise tax have been fully complied with by all persons required to perform administrative duties under this act.

§ 32. Action to Recover Tax.

SEC. 32. Any action to recover any excise tax levied pursuant to this act and paid under protest must be instituted within sixty days after the payment of such excise tax,

and failure to bring suit within said sixty days shall constitute waiver of any and all demands against this State on account of alleged overpayment of excise taxes hereunder. No grounds of illegality of the excise tax shall be considered by the court other than those set forth in the protest filed at the time of the payment of the excise tax.

If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any excise taxes due from the plaintiff under this act, and the balance of the amount of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount of excise tax found to have been illegally collected from the date of payment of such excise tax to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller.

In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any excise tax paid hereunder, when such action is brought by or in the name of an assignee of the manufacturer or importer paying said excise tax, or by any person, other than the person who has paid such excise tax.

§ 33. Distilled Spirits Excise Stamp

SEC. 33. The tax imposed by section 24 of this act upon the sale of distilled spirits shall be collected by means of attaching to each package containing such distilled spirits a stamp or stamps of a denomination equivalent to the amount of excise tax imposed upon the sale of the contents of such package. Such stamps shall be attached by the holders of on- or off-sale distilled spirits licenses issued under this act and by the holders of on-sale licenses for liquor other than beer and wine issued under the State Liquor Control Act, immediately upon opening the original cases in which the distilled spirits were packed and in which such distilled spirits were purchased from the manufacturer, rectifier, importer or wholesaler. In the case of

distilled spirits not in original cases at the time of purchase the stamps shall be attached immediately upon bringing such distilled spirits upon the premises for which such on- or off-sale licenses are issued.

Such stamps shall be sold by the board only to persons holding valid distilled spirits manufacturer's licenses, rectifier's licenses, distilled spirits and wine importer's licenses or distilled spirits wholesaler's licenses issued under this act or the State Liquor Control Act; provided, that until July 1, 1935, the board shall sell a sufficient number of such stamps, to stamp stocks of distilled spirits on hand, to persons holding valid on- or off-sale licenses for liquor other than beer and wine issued under the State Liquor Control Act; provided further, that the board may thereafter, in its discretion, sell such stamps to such holders of on- or off-sale distilled spirits licenses as it may determine.

On and after July 1, 1935, all distilled spirits delivered by any manufacturer, rectifier, importer or wholesaler of distilled spirits to any person holding an on- or off-sale distilled spirits license issued under this act or an on-sale license for liquor other than beer and wine issued under the State Liquor Control Act, must be accompanied by a sufficient number of stamps purchased from the board, to stamp the packages containing such distilled spirits. Every manufacturer, rectifier, importer or wholesaler of distilled spirits who delivers distilled spirits in violation of this section shall be guilty of a misdemeanor.

Such stamps shall be of such size, type, and character as the board shall determine; provided, that all such stamps must be of a character, design, and process which will give the State the maximum amount of protection against counterfeiting. The board shall have full charge and control of the issuance, securing, or purchase and of the sale of all such stamps and shall keep a record of all stamps sold.

At the time such stamps are attached to the packages of distilled spirits, they shall immediately be canceled by indelibly writing or stamping thereon the number of the licensee attaching the stamp and the date of cancellation.

§ 34. Effective Date of Provisions Requiring Attaching of Stamps; Penalty for Failure to Attach

SEC. 34. On and after July 1, 1935, it shall be unlawful for any person holding an on- or off-sale distilled spirits license issued under this act, or an on-sale license for liquor other than beer or wine issued under the State Liquor Control Act to have upon the premises for which any such license is issued any distilled spirits unless the stamps required by this act to be attached to the packages of such distilled spirits are so attached to said packages and canceled as herein required or unless such distilled spirits are still in the original cases in which such distilled spirits were purchased from the manufacturer, rectifier, importer or wholesaler, and such cases have not been opened since delivery to the premises for which such on- or off-sale licenses are issued.

On and after July 1, 1935, it shall be unlawful for any person holding an off-sale distilled spirits license issued under the act to sell under such license any distilled spirits unless the stamps required by this act to be attached to the packages of such distilled spirits are so attached to said packages, and canceled as herein required.

On and after July 1, 1935, it shall be unlawful for any person holding an on-sale distilled spirits license issued under this act or an on-sale license for liquor other than beer and wine issued under the State Liquor Control Act to serve or remove any distilled spirits from any packages at the premises for which such licenses are issued unless the stamps required by this act to be attached to the packages are so attached to said packages and canceled as herein required.

On and after July 1, 1935, it shall be unlawful for any person to deliver to any premises, for which an on- or off-sale distilled spirits license is issued under this act or for which an on-sale license for liquor other than beer or wine is issued under the State Liquor Control Act, any distilled spirits unless the containers of such distilled spirits bear a label or labels plainly indicating the quantity and proof

strength of the contents of such containers and the name of the manufacturer or distributor thereof.

On and after July 1, 1935, it shall be unlawful for any manufacturer, rectifier, importer or wholesaler of distilled spirits to deliver to any premises for which an on- or off-sale distilled spirits license is issued under this act or an on-sale license for liquor other than beer or wine is issued under the State Liquor Control Act, and it shall be unlawful for any such on- or off-sale licensee to sell at the premises for which any such license is issued distilled spirits in packages containing more than one gallon.

Any person violating the provisions of this section shall be guilty of a misdemeanor.

The board may seize and summarily destroy any distilled spirits found upon any premises in violation of this section.

§ 35. Unlawful Sale of Stamps

SEC. 35. It shall be unlawful for any person other than the board or its duly authorized agents or the holder of a valid distilled spirits manufacturer's license, rectifier's license, distilled spirits and wine importer's license or distilled spirits wholesaler's license issued under this act or the State Liquor Control Act to sell or give away any stamps issued by the board pursuant to the provisions of this act unless such stamps are attached to packages of distilled spirits as herein required. Any person violating the provisions of this section shall be guilty of a misdemeanor.

§ 36. Counterfeiting or Fraudulent Use of Stamps.

SEC. 36. Every person who makes, sells, or uses any false or counterfeit stamp or die for printing or making stamps which is in imitation of or purports to be a lawful stamp, or die of the kind before mentioned in this act, or who procures the same to be done, and every person who shall remove or cause to be removed, from any package of distilled spirits any stamp denoting the tax thereon, with intent to reuse such stamp, or who with intent to defraud the State, knowingly uses, or permits to be used any stamp removed from another package, or receives, buys, sells, gives away, or has in his possession, any stamp so removed, or makes

any fraudulent use of any stamp for distilled spirits, shall be guilty of a felony and shall be fined not less than one hundred dollars nor more than one thousand dollars, and imprisoned not less than six months nor more than three years in the State prison.

§ 37. Disposition of Funds Collected.

SEC. 37. All moneys collected as license fees and under the excise tax provisions of this act shall be deposited in the State treasury to the credit of the alcohol beverage control fund, which fund is hereby created. Moneys in said fund are hereby appropriated as follows:

1. Six hundred thousand dollars for expenditure by the board in carrying out the provisions of this act for collecting the excise taxes levied by this act;

2. Twelve thousand dollars, or so much thereof as may be necessary, for expenditure by the Controller in carrying out the provisions of this act requiring the collection of excise taxes;

3. Sixty thousand dollars to be used by the State Department of Public Health for enforcement work directed toward preventing the manufacture, sale or transportation of adulterated, misbranded or mislabeled alcoholic beverages;

4. One million four hundred thousand dollars to pay the salaries and expenses of auditors, inspectors and clerks employed by the board and to defray the necessary expenses arising by reason of the administration and enforcement of the provisions of this act;

5. Ten thousand dollars for expenditure by the State Department of Finance in auditing the revenues and expenditures resulting from the provisions of this act;

6. Fifty per cent of all moneys collected yearly from fees, to be paid to the counties, cities and counties, and cities of this State in the proportion that the amount of the fees collected in the particular couny, city and county, or city bears to the total amount so collected throughout the State, and

the State Controller shall, on or before March 31 of the year following that in which such moneys were collected, draw his warrants upon said fund in favor of the treasurer of each county, city and county, and city for the amount to which each is entitled hereunder;

7. The expenditures authorized by subdivisions 1, 2, 3, 4 and 5 of this section shall be made exclusively from the remaining fifty per cent of moneys collected from fees and no part thereof from the fifty per cent of fees payable to counties, cities and counties, and cities under the provisions of subdivision 5 of this section.

8. Such amount as is necessary for the allowance of the refunds provided for in this act;

9. Any remaining balance to be transferred to the general fund on the order of the Controller approved by the board.

The moneys to be used by the State Department of Public Health for enforcement work shall be expended as provided in "An act preventing the manufacture, sale or transportation of adulterated, mislabeled or misbranded food, liquor and drugs, and making an appropriation," approved March 11, 1907. The Director of Public Health shall communicate to the State Board of Equalization any findings which indicate that such act has been violated by any holder of a license under this act.

§ 38. Board Authorized to Make Rules and Regulations.

SEC. 38. The board shall administer all of the provisions of this act and to that end shall prescribe all necessary rules and regulations to carry out such provisions. The board shall have the power to require any report from any licensee, or transportation companies, and to make any examination of the books and records of any licensee it may deem necessary to perform its duties under this act, and for the performance of its duties shall have all the powers conferred upon it by section 3692 of the Political Code.

The members of the board and the persons employed by the board for the enforcement of the provisions of this act shall have the power to administer and certify oaths, and

shall have all the powers of peace officers in administering the provisions of this act.

The board and persons employed by it for the enforcement of this act shall at all times have the right to visit and inspect any portion of any premises for which licenses are issued under this act or under the State Liquor Control Act.

§ 39. Denial of Licenses.

SEC. 39. A written report of a member of the board or of an employee of the board engaged in the enforcement of this act disclosing that an applicant for a license or the premises for which a license is applied are not qualified for a license under this act shall constitute grounds for the denial of an application for a license.

Immediately upon the denial of any application for a license the board shall notify the applicant thereof in writing. Within ten days after mailing the notice the applicant may present his written petition for a license to the board.

Upon receipt by the board of a petition for a license in proper form it shall be referred to a representative of the board for hearing.

Protests may be made to the board at any time prior to the issuance of a license against either the original issuance of a license or the renewal of a license.

Protests must be in writing and filed in the main office of the board at Sacramento, and must state one or more grounds which would authorize the board, to deny or refuse the issuance of the license. The original copy of the protest must be verified unless made by public officers acting in their official capacity.

Upon receipt by the board of a protest in proper form it shall be referred to a representative of the board for hearing.

If a license has been issued to the applicant before receipt of the protest by the board, the protest shall be considered as a complaint against the licensee and a hearing had thereon as if a complaint had been filed.

§ 40. Complaints Against Licensees.

SEC. 40. Complaints may be made to the board by any person against any licensee. Complaints must be in writing and must state one or more grounds which would authorize the board to suspend or revoke the license or licenses of the licensee against whom the complaint is made.

A written report of a member of the board or of an employee of the board engaged in the enforcement of this act, or of a public officer disclosing grounds for the suspension or revocation of the license or licenses of any licensee shall be deemed a complaint against the licensee within the meaning of this act, even though not in the form of a complaint.

The original copy of complaints must be verified unless made by public officers acting in their official capacity or by employees of the board engaged in the enforcement of this act.

The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

(a) The violation or the causing or the permitting of a violation of this act or of the rules and regulations of the board by any licensee.

(b) The misrepresentation of a material fact by any applicant in obtaining any license hereunder.

§ 41. Hearings Before Representative of Board.

SEC. 41. Upon receipt by a representative of the board of a protest, a complaint or a petition for a license, the representative shall forthwith cause written notice of the time and place of the hearing of said protest, complaint or petition for a license to be given to the protesting or complaining party as well as the applicant, licensee or petitioner. The hearing shall be set for a date not more than fifteen days nor less than five days subsequent to the mailing of the notice and shall be held in the county seat of the county in which the premises of the applicant or licensee are located.

Enclosed with a copy of the notice of the time and place of hearing sent to the applicant or licensee shall be a copy of the protest or complaint as filed with the board.

The failure of an applicant for a license or a licensee to appear before the representative of the board at the time set for the hearing, except for the intervention of an act of God, shall be deemed an admission by him of the facts or acts charged in the protest or complaint and thereupon the representative of the board shall have the power to act as if the facts charged in the protest or complaint were found to be true.

The board or any member thereof or any representative appointed by the board to conduct hearings shall have the power to administer oaths, certify to all official acts, and to issue subpœnas for the attendance of witnesses and the production of papers, books, accounts, documents and testimony in any inquiry, investigation, hearing or proceeding in any part of the State.

Each witness who shall appear, by order of the board or member thereof or a representative appointed by it, shall be entitled to receive, if demanded, for each attendance the same fees and mileage allowed by law to witnesses in civil cases in the superior court, which amount shall be paid by the party at whose request such witness is subpœnaed, unless otherwise ordered by the board or the representative. When any witness who has not been required to attend at the request of any party is subpœnaed by the board, or a member thereof or a representative of the board, his fees and mileage may be paid from the funds appropriated for the use of the board in the administration of this act in the same manner as other expenses of the board are paid in the administration of this act.

The superior court in and for the county, or city and county in which any inquiry, investigation, hearing or proceeding may be held by the board or a representative appointed by it shall have the power to compel the attendance of witnesses, the giving of testimony and the production of papers, including books, accounts and documents as required by any subpœna issued by the board or any member thereof or a representative appointed by the board.

The board or any representative appointed by it, before whom the testimony is to be given or produced, in case of the refusal of any witness to attend or testify or produce any papers required by such subpœna, may report to the superior court, in and for the county, or city and county, in which the proceeding or hearing is pending, by petition, setting forth that due notice has been given of the time and place of attendance of said witness, or the production of said papers, and that the witness had been subpœnaed in the manner prescribed in this act, and that the witness has failed and refused to attend or produce the papers required by the subpœna, or has refused to answer questions propounded to him in the course of such proceeding or hearing, and ask an order of said court, compelling the witness to attend or testify or produce said papers before the board or representative. The court, upon the petition of the board or any member thereof or a representative appointed by the board, shall enter an order directing the witness to appear before the court at a time and place to be fixed by the court in such order, the time to be not more than ten days from the date of the order, and then and there show cause why he did not attend and testify or produce said papers before the board or representative of the board. A copy of said order shall be personally served upon said witness, and service shall not be made by registered mail as otherwise provided in this act.

If it shall appear to the court that said subpœna was regularly issued by the board or member thereof or a representative of the board and the witness was legally bound to comply therewith, the court shall thereupon enter an order that said witness shall appear before the board or representative at a time and place to be fixed in such order, and testify or produce the required papers, and upon failing to obey such order said witness shall be dealt with as for contempt of court.

§ 42. Conduct of Hearings; Deposition of Witnesses.

Sec. 42. All hearings and investigations before the board or any representative appointed thereby shall be governed by this act and other applicable provisions of law not incon-

sistent herewith and in the conduct of said hearings neither the board nor any representative appointed by it shall be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in such manner through oral testimony and printed records as is best calculated to extend the substantial rights of the parties and carry out jointly the spirit and provisions of this act.

The board, or any member of the board or any representative appointed by it, or any party to the action or proceeding may, in any investigation or hearing before the board or a representative thereof cause the deposition of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in the superior court of this State, and to that end may compel the attendance of witnesses and the production of books, documents, papers and accounts; provided that depositions taken outside of the State may be taken before any officer authorized to administer oaths.

§ 43. Certification of Findings to Board.

SEC. 43. Within ten days after the hearing the representative of the board shall certify to the board his findings of ultimate fact whether the protest, complaint or petition is true or not, and in the case of hearings on complaints the representative may make recommendations in respect to the suspending or revoking of licenses. The findings and recommendations of the representative shall not be open to public inspection, either to the applicant, licensee, protestant, complainant or any other person.

§ 44. Notice of Board's Decision.

SEC. 44. After the findings of the representative of the board are filed, the board shall make its decision upon the petition for a license, protest or complaint, and shall notify the petitioner, protestant, complainant, and licensee thereof. Within ten days after the mailing of the notice, the petitioner, protestant, complainant or licensee may petition the board for a reconsideration of the cause. Such petitions shall be verified unless filed by a public officer acting in his official capacity.

§ 45. Rehearing by Board.

SEC. 45. Within thirty days after receipt by the board of a petition for reconsideration the board shall itself rehear the entire matter de novo and shall thereupon and within said thirty days either affirm, modify or set aside its original order.

§ 46. Court Review of Board's Action.

SEC. 46. The action of the board upon a petition for a license, a protest, complaint, or a petition for reconsideration shall be subject to review by any court of competent jurisdiction.

§ 47. Petition for Reconsideration Not a Bar to Review by Court.

SEC. 47. The filing of a petition for reconsid[illegible] with the board shall not be a bar to any application to the courts for relief and shall not prevent a court from reviewing or setting aside the action of the board upon a petition for a license, protest or complaint.

§ 48. Service of Notice.

SEC. 48. Service of the notices required by this act may be made personally or by mail; if by mail service shall be made in the manner prescribed by section 1013 of the Code of Civil Procedure.

§ 49. Restriction on Deliveries by Common Carriers.

SEC. 49. Common or private carriers shall transport alcoholic beverages into the State only when such alcoholic beverages are to be consigned to a licensed importer. The carrier must obtain the receipt of such importer for the alcoholic beverage so transported and delivered and, if the consignee refuses to give a receipt and show his importer's license to the carrier, the carrier shall be relieved of all responsibility for delivering said alcoholic beverage. Where the consignee is not a licensed importer the carrier shall

immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and address of the consignor and consignee and within ten days such alcoholic beverage shall be summarily forfeited to the State of California and shall be turned over to the board for sale at public auction.

Every person violating the provisions of this section shall be guilty of a misdemeanor.

§ 50. Postal Shipments.

SEC. 50. Postal authorities may refuse delivery of any shipment of alcoholic beverage originating outside of this State. Postal authorities may turn such alcoholic beverage over to the board. The beverage when received shall be summarily forfeited to the State, to be sold at public auction by the board. Every person violating the provisions of this section shall be guilty of a misdemeanor.

§ 51. Unlawful Possession; Power to Seize.

SEC. 51. It shall be unlawful for any licensee to have upon any premises for which licenses have been issued to such licensee any alcoholic beverages other than the alcoholic beverages which such licensee is authorized to sell at such premises under the license or licenses issued therefor.

It shall be presumed that all alcoholic beverages found or located upon premises for which licenses have been issued belong to the person or persons to whom such licenses were issued.

Every person violating the provisions of this section shall be guilty of a misdemeanor. The board or its representatives may either seize and summarily destroy or may seize and sell at public auction any alcoholic beverages found upon any premises in violation of this section.

The board shall also have the power to seize and summarily destroy or sell at public auction the following alcoholic beverages:

1. Alcoholic beverages manufactured in this State by any person other than a licensed manufacturer, regardless of where found;

2. Beer and wine upon the sale of which the excise tax imposed by this act has not been paid, regardless of where found;

3. Distilled spirits except (a) distilled spirits located upon premises for which licenses authorizing the sale of such distilled spirits have been issued; (b) distilled spirits consigned to and in the course of transportation to a licensee holding licenses authorizing the sale of such distilled spirits; (c) distilled spirits the containers of which bear the stamps herein required to be attached thereto; (d) distilled spirits in United States Government bonded warehouses.

§ 52. Restrictions on Sales in Public Barrooms.

SEC. 52. Every person who sells, serves or otherwise disposes of any alcoholic beverage, except beer which may be so sold, served or disposed of, over or at any public bar or in any public barroom, for consumption on the premises, shall be guilty of a misdemeanor.

§ 53. Failure to File Reports; False Information.

SEC. 53. Any person who fails, neglects or refuses to file any report required to be filed by this act within ten days after the report is required to be filed, or who makes any false statement or conceals any material fact in any application for a license or in any record, report, affidavit or claim provided for herein, shall be guilty of a misdemeanor unless such act is by any other law of this State declared to be a felony, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not less than one month, nor more than six months, or by both such fine and imprisonment.

§ 54. Restrictions on Owning Interest in On Sale Premises.

SEC. 54. No manufacturer, rectifier, distiller, bottler, importer or wholesaler or any officer, director or agent of any such person shall

(a) Hold the ownership, directly or indirectly, of any interest in any "on-sale" license;

(b) Furnish, give or lend any money or other thing of value, directly or indirectly, to, nor guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning or maintaining any "on-sale" premises where alcoholic beverages are sold for consumption on such premises;

(c). Furnish, give, rent, lend or sell, directly or indirectly, any equipment, fixtures or supplies, other than alcoholic beverage directly or indirectly to any person engaged in operating, owning or maintaining any "on-sale" premises where alcoholic beverages are sold for consumption on such premises, provided that this subdivision shall apply only to manufacturers, bottlers, importers or wholesalers of products of the brewing industry;

(d) Furnish, give, lend or rent directly or indirectly to any person any decorations, paintings or signs other than signs for interior use of not to exceed in area six hundred thirty square inches for use in or about or in connection with any premises where alcoholic beverages are sold for consumption on such premises, or pay money or any thing of value for the privilege of placing or painting a sign or advertisement, or window display on or in any premises selling alcoholic beverages at retail;

(e) Own any interest, directly or indirectly, in the business, furniture, fixtures, signs, except signs for interior use mentioned in subdivision (d) herein, refrigeration equipment or lease in or of any premises operated or maintained under any "on-sale" license for the sale of alcoholic beverages for consumption on the premises where sold; or own any interest directly or indirectly, in realty hereafter acquired upon which such "on-sale" premises are maintained unless the holding of such interest is permitted in accordance with regulations of the board.

Any person violating any provision of this section shall be guilty of a misdemeanor and any holder of any retail "on-sale" or retail "off-sale" license who shall solicit the

violation of the provisions of this section or accept or permit to be accepted on his behalf and with his consent any of the prohibited matters, articles or acts herein designated shall be guilty of a misdemeanor; provided, however, that the provisions of this section shall not apply to any equipment, fixtures or supplies furnished, given, lent or sold prior to the passage of this act so long as such equipment, fixtures or supplies remain in the premises in which installed prior to such time, nor shall the provisions of this act apply to carbonic acid gas or tapping accessories if sold at the reasonable open market value and the aggregate cost of tapping accessories furnished to any one person does not exceed $5.00 in any one calendar year.

§ 55. Restrictions on Use of Signs.

SEC. 55. No sign or signs, which in whole or in part advertise any alcoholic beverage, and exceed in area seven hundred twenty square inches and no sign using the words "bar," "barroom," "saloon," "cocktail bar" or "lounge," or words of like or similar import, shall be maintained, erected, used or placed upon or adjacent to the outside of any building and in connection with any premises therein licensed to sell alcoholic beverages at retail for consumption on such premises.

Signs or other advertising matter used in connection with the licensed premises of any retailer of alcoholic beverages shall not be of any obnoxious, gaudy, blatant or offensive nature and shall in no manner contrary to the rules or regulations of said board obstruct the view of the interior of the premises from the street.

Each and every holder of an "on-sale" retail license who shall give, sell or otherwise dispense any draught beer, shall, upon the faucet, spigot or outlet where from such beer is drawn, attach and keep posted a clear and legible notice, placard or marker which shall in the English language indicate and declare the name or brand adopted by the manufacturer of such draught beer so given, sold or dispensed by such licensee, and which notice, placard or marker shall be so situated as to be clearly legible for a

distance of at least ten (10) feet from such spigot, faucet or outlet to a person with normal vision, and such notice, sign or placard shall at all times be so situated as to be so clearly legible from the place where such "on-sale" licensee serves any customer or consumer of such beer, and provided further that if such faucet, spigot or other drawing device is in a location not within the room of the place of service and consumption of such beer, then, and in that event there shall also be kept posted a similar notice, placard or marker in the place of service and consumption of such beer which shall truthfully state and indicate only the kinds and brands of draught beer actually on sale in the premises of the "on-sale" licensee.

Any person who shall violate any of the provisions of this section, or who shall substitute another or different brand of draught beer from that indicated by any of the notices, placards or markers hereinabove provided for; or who shall substitute one brand of beer for another, or misrepresent the brand or kind of beer served to a consumer, shall be guilty of a misdemeanor for such violation or noncompliance. Any person who sells or otherwise disposes of, except for export, any draught beer containing more than three and two-tenths per cent of alcohol by weight and any person who sells or otherwise disposes of, except for export, any bottled beer containing more than four per cent of alcohol by weight, shall be guilty of a misdemeanor; provided, that this limitation shall not apply to the sale of ale, porter, brown and stout in bottles bearing labels properly describing the contents under any licenses, other than on sale beer licenses, issued under this act or the State Liquor Control Act.

§ 56. Employment of Minors Unlawful.

SEC. 56. Every person who employs or uses the services of minors in or on that portion of any premises which are used for the sale and service of alcoholic beverages for consumption on the premises shall be guilty of a misdemeanor.

§ 57. Employment of Hostesses and Entertainers on Percentage Basis Unlawful.

SEC. 57. It shall be unlawful for any person to pay or agree to pay any hostess, waitress, entertainer or other person a percentage of the receipts from sales of alcoholic beverages solicited or made by such hostess, waitress, entertainer or other person a salary or remuneration the amount of which is in any way dependent upon the amount or number of sales of alcoholic beverages solicited or made by such hostess, waitress, entertainer or other person. Provided, that this section shall not prohibit the holders of manufacturer's, rectifier's or wholesaler's licenses from employing and paying salesmen engaged in selling or soliciting sales for alcoholic beverages on a commission basis.

Every person who violates the provisions of this section shall be guilty of a misdemeanor.

§ 58. Disorderly Houses Unlawful.

SEC. 58. Every person who keeps or permits to be used or suffers to be used any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience or safety shall be guilty of a misdemeanor.

§ 59. Sales on Election Day Unlawful.

SEC. 59. Every on- or off-sale licensee who sells, gives away or furnishes any alcoholic beverage in any election district or precinct in any county in the State where an election is in progress, during the hours when by law the polls are required to be kept open for voting shall be guilty of a misdemeanor.

§ 60. Restrictions as to Time of Making Wholesale Deliveries.

SEC. 60. Except as otherwise provided in this section, no person licensed to manufacture, import or wholesale any

alcoholic beverage shall deliver or cause to be delivered any beer to or for any person holding an on-sale or off-sale license except between the hours of six a.m. and eight p.m. and no such delivery of any alcoholic beverage shall be made or caused to be made by any such licensee on Sunday. Alcoholic beverages may be delivered at the platform of the manufacturing or distributing plant at any time. Every person violating the provisions of this section shall be guilty of a misdemeanor.

§ 61. Sales to Minors Unlawful.

SEC. 61. Every person who sells, furnishes, gives, or causes to be sold, furnished or given away any alcoholic beverage to any person under the age of twenty-one years shall be guilty of a misdemeanor; provided, that this section shall not apply to the parents or guardians of such persons under twenty-one years of age.

§ 62. Sales to Habitual Drunkard Unlawful.

SEC. 62. Every person who sells, furnishes, gives or causes to be sold, furnished or given away, any alcoholic beverage to any habitual or common drunkard shall be guilty of a misdemeanor.

§ 63. Restrictions on Bringing Alcoholic Beverage Into Jails, etc.

SEC. 63. Every person, not authorized by law, who brings into any State prison, town or county jail, or city and county jail, or reformatory in this State or within the grounds belonging to any such institution any alcoholic beverage of any kind whatsoever shall be guilty of a felony.

§ 64. Sales on Public School Grounds Unlawful.

SEC. 64. Every person who sells, gives or delivers to any other person any alcoholic beverage at any public schoolhouse or upon any portion of the grounds thereof shall be guilty of a misdemeanor. Any person convicted of a violation of this section shall, in addition to the penalty imposed for the misdemeanor, be barred from having or

receiving any privilege of the use of public school property which is accorded by Chapter II of Part III of Division VI of the School Code of this State.

§ 65. Punishment for Misdemeanors; Disposition of Fines.

SEC. 65. Every person convicted of a misdemeanor for a violation of any of the provisions of this act for which another punishment is not specifically provided for herein, shall be punished by a fine of not more than five hundred dollars or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

All fines and forfeitures imposed for a violation of this act and collected in any court, except police courts, city justices' courts, city courts, and recorders' courts of cities or towns, must be paid to the county treasurer of the county in which the court is held; provided, that all fines and forfeitures collected in any police court, city justice's court, city court, or recorder's court, of any city or town that is maintained and the salaries of the officers thereof paid by the city shall be paid to the city treasurer of the city in which such court is located, excepting, however, all forfeitures collected by the judge of any of said courts when sitting as a committing magistrate.

§ 66. Punishment for Felony.

SEC. 66. Every person convicted of a felony for a violation of any of the provisions of this act for which another punishment is not specifically provided for herein, shall be punished by a fine of not more than five thousand dollars or by imprisonment in the State penitentiary for not less than one year nor more than five years or by both such fine and imprisonment.

§ 67. Act Not Applicable to Denatured Alcohol.

SEC. 67. It is hereby declared that this act shall not apply to the manufacture, sale or use of completely denatured ethyl alcohol or special denatured ethyl alcohol, as these

substances are defined in the various statutes and regulations of the United States Government relating thereto.

Nothing in this act shall be deemed to prevent or restrict the use of tax-free ethyl alcohol under regulation of the Treasury Department of the United States government by any governmental agency, State or Federal, or any scientific university or college of learning or any laboratory for use exclusively in scientific research or to any hospital or sanitarium.

Nothing in this act shall be deemed to prevent or restrict the use of tax-free alcohol or of industrial alcohol or other distilled spirits or wine under regulation of the United States government in the manufacture of medicinal pharmaceutical, or antiseptic products, including prescriptions compounded by retail druggists; of toilet products, of flavoring extracts, sirups, of food products, of scientific, chemical, or industrial products; provided such products are unfit for beverage use.

§ 68. 1933 Liquor Control and Beverage Tax Acts Effective Until July 1, 1935.

SEC. 68. The State Liquor Control Act, Chapter 658, Statutes of 1933, and Chapter 178, Statutes of 1933, shall remain in effect until July 1, 1935, after which date said acts shall no longer be of any force and effect; provided, that any taxes imposed pursuant to Chapter 178, Statutes of 1933, prior to said date shall remain fully collectible.

§ 69. Schedule of Laws Repealed.

SEC. 69. The following acts and sections, together with all amendments thereof and all acts supplementary thereto, are repealed.

Year	Chapter	Page	Year	Chapter	Page
1855	188	240	1873–74	300	434
1858	232	193	1873–74	345	509
1860	223	186	1875–76	473	691
1871–72	188	231	1880	83	80
1873–74	13	12	1889	241	352
1873–74	27	27	1891	87	91
1873–74	198	297			

Year	Chapter	Page	Year	Chapter	Page
1895	156	161	1911	351	599
1903	240	319	1915	21	20
1905	26	20	1921	80	79
1905	123	126	1925	89	221
1907	104	127	1933	51	340
1909	413	722	1933	149	598

Penal Code Sections.

63b 397b 680

Political Code Sections.

3381
3383

School Code Sections.

3.80
3.81

§ 70. Constitutionality.

SEC. 70. If any sections, subsection, clause, sentence or phrase of this act which is reasonably separable from the remaining portion of this act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this act. The Legislature hereby declares that it would have passed the remaining portions of this act irrespective of the fact that any such section, subsection, clause, sentence or phrase of this act be declared unconstitutional.

§ 71. Act Effective Immediately.

SEC. 71. This act, inasmuch as it provides for tax levies for the usual current expenses of the State, shall, under the provisions of section 1 of Article IV of the Constitution, take effect immediately.

SUBJECT INDEX.

PAGE

OPINION OF LOWER COURT REPORTED 3

STATEMENT OF FACTS 4

Plaintiffs Beer Importers 4

Plaintiffs Licensed Beer Wholesalers 5

Hearing Upon Complaint and Return 6

Issues of Law, Not of Fact 6

California A. B. C. Act Held Invalid re Imports 7

ANALYSIS CALIFORNIA ALCOHOLIC BEVERAGE CONTROL ACT 8

Sec. 2(k) Importer defined 8

Sec. 3 Importer's license required 9

Sec. 5(8) Importer's license fee $500 9

Sec. 6(d) Importer's license privileges 9

Sec. 7 Separate license each location 9

Sec. 10 Application for license 10

Sec. 11 Investigation of applicant 10

Sec. 23 Beer excise tax 10

Sec. 25 Bond of importer 10

Sec. 26 Monthly reports 10

Sec. 31 Collection taxes, fees, etc 10

Sec. 49 Carriers 10

SPECIFICATIONS OF ERROR 11

1. Holding import provisions unconstitutional 11

2. Holding import rules unconstitutional 14

3. Holding import provisions violate commerce clause 14

4. Holding import provisions invalid police power 15

5. Holding import provisions discriminatory 15

6. Finding importer's license direct charge on beer 15

PAGE

SUMMARY OF ARGUMENT 16
Point One: Immunity Clause 16
Point Two: Fourteenth Amendment 16
Point Three: Commerce Clause 17
Point Four: Discrimination 20
Point Five: Unsupported Finding 21

ARGUMENT 22
Point One: Immunity Clause 23
Point Two: Fourteenth Amendment 24
Point Three: Commerce Clause 28
State Control Permitted (1847-1887) License cases 28
State Control Denied (1887-1890) Bowman, etc. cases 31
State Control in part (1890-1913) Wilson Act 33
State Control Granted (1913-1933) Webb-Kenyon Act 34
State Control Assured (1933-) 21st Amendment 40
History of 21st Amendment 40
Judicial Construction of 21st Amendment 44
Point Four: Discrimination 49
Original Sources—Manufacturer and Importer 49
Advantage in License Fee to Manufacturer 50
Comparison between Importer and Wholesaler Unwarranted 50
Point Five: Finding Unsupported. No evidence presented.. 56

CONCLUSION 56

TABLE OF AUTHORITIES CITED.

Cases: PAGE

Adams Express Co. v. Kentucky, 238 U. S. 190.....36, 37, 42
Baldwin v. Selig, 294 U. S. 511..... 47
Barbour v. Georgia, 249 U. S. 454, 39 S. C. 316, 63 L. ed. 704.....17, 25
Bartemeyer v. Iowa, 18 Wall. (U. S.) 129..... 16
Blum & Co. v. Henry (Wis.), 3-28-36..... 48
Bowman v. Chicago, etc. Ry. Co., 125 U. S. 465..... 31
Bozeman v. State, 7 Ala. App. 151, 61 So. 604.....16, 23
Bradwell v. Illinois, 83 U. S. 130, 21 L. ed. 442.....16, 23
Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311, 37 S. C. 180, 61 L. ed. 326.....17, 18, 26, 35
Cox v. Texas, 202 U. S. 446, 26 S. C. 671, 50 L. ed. 1099 .....17, 24
Crane v. Campbell, 245 U. S. 304, 38 S. C. 98, 62 L. ed. 304 .....17, 27
Crowley v. Christensen, 137 U. S. 91, 11 S. C. 13, 34 L. ed. 620 .....16, 24
Darnell & Son v. Memphis, 208 U. S. 113..... 46
Detroit v. Osborne, 135 U. S. 492, 10 S. C. 1012, 39 L. ed. 260..... 23
Fry v. Rosen, 198 N. E. 375..... 47
General Sales & Liquor Co. v. Becker, 14 Fed. Supp. 348.. .....46, 48
Gray v. Conn., 159 U. S. 777, 15 S. C. 95, 40 L. ed. 80..... 25
Guy v. Baltimore, 100 U. S. 434..... 46
Hawkins v. Hawkins, 350 Ill. 227, 183 N. E. 9.....16, 23
Kidd v. Pearson, 128 U. S. 16, 9 S. C. 6, 32 L. ed. 346..16, 24
Leisy v. Hardin, 135 U. S. 100.....17, 31
McCormick v. Brown, 286 U. S. 131, 52 S. C. 522, 76 L. ed. 1017.....18, 38
Mugler v. Kansas, 123 U. S. 623, 8 S. C. 273, 31 L. ed. 205 .....16, 24

Cases (continued): PAGE

Premier-Pabst Sales Co. v. Grosscup, 12 Fed. Supp. 970.... 48
Premier-Pabst Sales Co. v. McNutt, U. S. D. C. (Ind.) 1-4-35 47
Reymann Brewing Co. v. Brister, 179 U. S. 445, 21 S. C. 201, 45 L. ed. 69..... 55
Rosen v. Fry, 296 U. S. 526, 55 S. C. 143, 79 L. ed. 636.... 47
Samuels v McCurdy, 267 U. S. 188, 45 S. C. 264, 69 L. ed. 568.....17, 25
Seaboard Ry. v. N. Carolina, 245 U. S. 298, 38 S. C. 96, 62 L. ed. 299.....18, 38
Slaughterhouse Cases, 16 Wall. 77, 21 L. ed. 394..... 23
Southern Express Co. v. Whittle, 194 Ala. 406, 69 So. 652 26
State v. Hodgson, 66 Vt. 134, 28 Atl. 1039; aff'd 168 U. S. 262, 273, 18 S. C. 80, 42 L. ed. 461.....16, 23
State v. Parker, 236 Mo. 219, 139 S. W. 453.....17, 26
Triner v. Arundel, 11 Fed. Supp. 145..... 44
Van Winkle v. The State, 27 Delaware, 578..... 37
Walling v. Michigan, 116 U. S. 446..... 46
Webber v. Virginia, 103 U. S. 344..... 46
Young's Market Co., et al. v. State Board of Equalization, et al., 12 Fed. Supp. 140..... 3

Statutes: PAGE

Alcoholic Beverage Act, Sec. 2 (k).....8, 11, 12
Alcoholic Beverage Act, Sec. 49..... 13
Constitution of California, Art. XX, Sec. 22..... 8
Constitution of United States, Art. I, Sec. 8, Cl. 3.....17, 22
Constitution of United States, Art. IV, Sec. 2, Cl. 1.....16, 22
Constitution of United States, Art. XIV.....16, 22
U. S. Code Annotated, Sec. 380..... 6

Miscellaneous: PAGE

76 Congressional Record, p. 4143..... 41

INDEX TO APPENDIX.

PAGE

A. CHRONOLOGY 59

1890: Wilson Act 59

1913: Webb-Kenyon Act 59

1917: Reed Amendment 60

1933: Twenty-first Amendment 60

1934: Art. XX, Sec. 22, California Constitution 61

1935: California A. B. C. Act 63

B. OUTLINE OF CONSTITUTIONAL AND LEGISLATIVE LIQUOR HISTORY 68

1776 I. Power of Colonies 68

1789 II. Commerce Clause U. S. Constitution 70

1847 License Cases 70

1885 Walling v. Michigan 71

III. Development Original Package Doctrine 72

1887 Bowman v. Chicago 72

1889 Leisy v. Hardin 73

IV. Congressional History of Wilson Act 75

1889 Original Form of Bill 76

1890 The Wilson Act 77

V. Decisions Under Wilson Act 78

1891 In re Rahrer 78

1896 Scott v. Donald 80

1898 Vance v. Vandercook Co. 82

1898 Rhodes v. Iowa 84

1900 Reymann Brewing Co. v. Brister 86

1904 American Express Co. v. Iowa 86

1905 Pabst Brewing Co. v. Crenshaw 87

1906 Delamater v. S. Dakota 90

PAGE

1907 Phillips v. City of Mobile 92
1908 Adams Express Co. v. Kentucky 93
1912 L. & N. R. R. Co. v. Cook Brewing Co. 94
1912 DeBary v. Louisiana 94
VI. Congressional History of Webb-Kenyon Act 95
1913 Webb-Kenyon Act 97
VII. Decisions Under Webb-Kenyon Act 100
1914 Rossi v. Pennsylvania 100
1915 Adams Express Co. v. Kentucky 100
1917 Clark Distilling Co. v. Western Maryland Ry. 103
1917 Seaboard Airline v. N. Carolina 108
1917 VIII. Reed Amendment 110
1918 U. S. v. Hill 111
1920 IX. Eighteenth Amendment 113
1922 Rainier Brewing Co. v. Great Northern .. 113
1932 McCormick v. Brown 115
X. Twenty-first Amendment 118
1932 Original Form 118
Congressional Debate 119
1933 Final Form 123
Decisions Under 21st Amendment 123
1- 4-35 Premier-Pabst Sales Co. v. McNutt (Ind.) 123
6-29-35 Triner Corp. v. Arundel (Minn.) 125
10- 9-35 Young's Market Co. v. Board of Equalization (Cal.) 128
12-10-35 Premier-Pabst Sales Co. v. Grosscup (Penn.) 127
2-10-36 General Sales Co. v. Becker (Mo.) 128
2-28-36 Pac. Fruit & Prod. Co. v. Martin (Wash.) 130
3-28-36 Blum v. Henry (Wis.) 130

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936.

No. 22.

State Board of Equalization of the State of California, et al.,
Appellants,

vs.

Young's Market Company, et al.,
Appellees.

BRIEF ON BEHALF OF APPELLANTS.

REFERENCE TO REPORT OF OPINION OF LOWER COURT.

The official report of the opinion of the United States District Court for the Southern District of California, Central Division, the lower court from which the appeal is taken in this proceeding, is found in *Young's Market Co. et al. v. State Board of Equalization et al.*, 12 Fed. Supp. 140.

Lower Court Opinion 12 Fed. Supp. 140.

STATEMENT OF FACTS.

Plaintiffs (appellees here), corporation and individual, citizens of the State of California, are engaged in the business in that State of importing beer made outside of said State, and distributing and selling the same at wholesale in California. They brought the action in the District Court of Southern California on behalf of themselves and all others similarly situated, to restrain the defendants, as officials of the State of California, from enforcing the provisions of the California Alcoholic Beverage Control Act as to beer importers. [R. 1, 42, 43.] All of the plaintiffs possess established places of business and warehouses in California where they store the beer and from which they distribute the same. One of them maintained such warehouses at twelve different cities in that State. [R. 14.] None of the plaintiffs maintain or operate any brewery. [R. 2, 3.]

Plaintiffs Resident Importers and Wholesalers.

Some Plaintiffs Have Warehouses in Several Cities in State.

These plaintiffs have been importing such beer into California from Missouri and Wisconsin direct to their several warehouses. The transportation charges are less in so doing than if the beer were imported by each or any plaintiff to one point only in California, and then redistributed from such central point or points to the different warehouses. [R. 13, 14, 15.] The defendant Board, entrusted with the administration of such Act, had ruled

Shipping Charge Less When Sent Direct to Each Warehouse.

that an importer was required to procure a separate license for each point within the State to which alcoholic beverages were shipped to him from a point outside the State. [R. 46.]

Plaintiffs Licensed Wholesalers.

All of the plaintiffs were also wholesalers of beer and had secured and were operating under the requisite licenses as provided in said Act to engage in the business as wholesalers in that State. [R. 13, 14, 15, 16, 17.]

Never Applied for Importers' Licenses.

Plaintiffs have refused to apply for and obtain importers' licenses for various or any of the places of business to which they import beer, and the defendants have threatened in their official capacity as officers of the State of California, to enforce against plaintiffs all of the provisions of the said Act. [R. 19, 56.]

A. B. C. Act Only Liquor Regulation.

The right to manufacture, possess, sell, and use beer within the State of California is limited, restricted or prohibited only by the provisions of the said Alcoholic Beverage Control Act, and there is no other statute regulating or pertaining to the importation of beer into such State. [R. 9, 10, 47.]

Each of the plaintiffs had been engaged in the importation, sale, and distribution of beer in California for at least a year next preceding the commencement of the action in the lower court, and had expended a considerable sum of money, by advertising and otherwise, in developing

Value of Importing Business.

such business and creating a demand among its customers for such beer manufactured outside of the State of California; and the value of such beer which each plaintiff had annually purchased, imported, and sold in such State, amounted to a sum in excess of $25,000.00. The plaintiffs intend and plan to continue such business in the same manner and have placed orders and made arrangements for so doing. [R. 54.]

There are approximately 34 breweries in the State of California, and such beer brewed in that State is in competition with beer imported into the State by plaintiffs. The price at which the beer imported into the State of California may be sold at wholesale, as compared with the prices at which beer manufactured in such State may be sold at wholesale, is an item entering into the saleability of such imported beer. [R. 55.]

Competition Between Local and Imported Beer.

The matter was heard in the District Court before a regularly constituted three judge court organized under the provisions of Section 380 of the United States Code Annotated upon the application of plaintiffs for an interlocuctory injunction. It was stipulated that the application for such temporary injunction be heard upon the Bill of Complaint and upon the defendants' return to the order to show cause, and further, that the issues for determination were of law and not of fact, and that there would be nothing additional to be presented upon a final

Preliminary Hearing as Final Disposition in District Court.

hearing for permanent injunction and that, therefore, the decree of the court upon such hearing should be considered as the final disposition of the cause in such court without further hearing of proof. It was concededed by defendants that the plaintiff, Simon Levi Company, Ltd., had been and was then operating twelve separate warehouses in the State, at each of which it had been importing beer from outside of such State, and that under the ruling of the defendant Board, to continue doing so it would be required to obtain a separate beer importer's license for each of said warehouses at a cost of $500.00 each, or $6000.00 for the twelve.

A. B. C. Act Held Unconstitutional as to Imports.

The lower court decided that the provisions of the California Act relative to imports of alcoholic beverages were invalid as violative of the commerce clause of the Federal Constitution and granted an injunction against the enforcement thereof.

ANALYSIS OF CALIFORNIA ALCOHOLIC BEVERAGE CONTROL ACT.

For the convenience of the Court, we will briefly refer to the pertinent provisions of the Act as are germane to the questions here before the Court. The complete Act is set out in full in the Statement as to Jurisdiction, pages 5 to 55 inclusive.

After the adoption of the Twenty-first Amendment to the Federal Constitution, the people of the State of California, on Nov. 6, 1934, amended Section 22 of Article XX of their State Constitution.

1934, Nov. 6, State Constitution Amended.

By this constitutional amendment it was provided that: ". . . The State Board of Equalization shall have the exclusive power to license the manufacture, *importation* and sale of intoxicating liquors in this State, . . . It shall be unlawful for any person other than a licensee of said board to manufacture, *import* or sell intoxicating liquors in this State."

1935, June 13, A. B. C. Act Enacted.

In accordance with this constitutional amendment, the legislature on June 13, 1935, enacted the Alcoholic Beverage Control Act.

This Act defined "Importer" (Sec. 2 (k), Jurisdictional Statement p. 12) as:

Importer Defined.

"(k) 'Importer' means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the act of importation is completed."

It then provided (Sec. 3, Juris. Stat. p. 14) that any person performing any act which would constitute such person an importer would be guilty of a misdemeanor unless duly licensed, and fixed the annual license fee for beer importers at $500.00 (Sec. 5 (8), Juris. Stat. p. 15).

Beer Importer License Fee, $500.

License privileges were defined as (Sec. 6 (d), Juris. Stat. p. 17):

> "(d) Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license and to export such alcoholic beverage."

License Required for Each Place of Importation.

"Separate licenses" were required "for each of the premises of any business establishment having more than one location." (Sec. 7, Juris. Stat. p. 18.) Further elucidating this requirement, the Board promulgated a rule providing that [Rule 9a, R. 46]:

> "A licensee holding an importer's license for one premise may not have alcoholic beverages shipped to him from a point outside the State directly to an-another premise in this State for which he has not been issued an Importer's license."

It was further stated in such Rule that, "Beverages may be shipped from points outside the State only to premises for which Importer's licenses have been issued." But that, "After the beverages have been delivered to the premises for which the consignee holds an Importer's license, he may, if he desires to do so, reship them to other

premises for which appropriate wholesale or retail licenses have been issued."

Importer's License Only Authorizes Receipt.

The Importer's license did not authorize bottling, preparation or selling in any manner, nor did any other license authorize importation. [Rule 9(e), R. 47.]

License Application.

Sections 10 and 11 of the act (Juris. Stat. pp. 19 and 20) provided for the manner of making application for licenses and investigation and refund of fees.

An excise tax was also imposed upon all manufactured and imported beer sold within the State (Sec. 23, Juris. Stat. p. 23), and every manufacturer and importer of beer was required to post a bond to assure the payment of such excise tax (Sec. 25, Juris. Stat. pp. 24 to 26). They were also required to render monthly reports of the amount of liquor sold (Sec. 26, Juris. Stat. p. 27).

Excise Tax

Section 31 of the Act provided for the collection of all taxes, interest or penalties.

Carriers May Deliver Only to Licensed Importers.

Carriers were prohibited from transporting liquor into the State unless it was consigned to a duly licensed importer (Sec. 49, Juris. Stat. pp. 45, 46).

The lower Court held all these provisions [R. 57 to 61], except Sections 23, 25, 26, and 31 relative to excise taxes, "invalid, void and unconstitutional" [R. 57], and stated that they imposed discriminatory burdens [R. 61] upon imported beer and were "not a valid exercise of the police powers of said State, but constitute unlawful burdens upon interstate commerce, in violation of the Constitution of the United States." [R. 62.]

SPECIFICATIONS OF ERROR TO BE URGED.

1. The District Court erred in finding and holding that the California Alcoholic Beverage Control Act is invalid, void, and unconstitutional in either or any and in each and all of the following particulars, terms, and provisions thereof, to-wit:

(a) Section 2, subsection (k) thereof, which reads:

"'Importer' means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the act of importation is completed."

insofar as said subsection refers to a person who imports, receives or possesses beer brought in to the State of California from outside said State.

(b) Section 3 thereof, which reads:

"On and after July 1, 1935, no person shall perform any act or acts which would constitute such person a manufacturer, rectifier, importer, wholesaler, or retailer of any alcoholic beverage within the meaning of this act or shall package, label or sell any alcoholic beverage unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act, or pursuant to the provisions of the State Liquor Control Act, Chapter 658, Statutes of 1933; any person violating any provisions of this section shall be guilty of a misdemeanor."

insofar as said section applies or refers to a beer importer's license or requires a beer importer's license of a person who imports, receives or possesses beer brought into the State of California from outside said State.

(c) That portion of Section 5 thereof, reading as follows:

"The following are the types of licenses to be issued under this act and the annual fees to be charged therefor:

* * * * * * * * * *

8. Beer importers' license $500.00 per year

* * * * * * * * *"

insofar as it refers to "beer importer's license" and the fee to be charged therefor:

(d) That portion of Section 6 thereof reading as follows:

"Except as otherwise provided in this act and subject to the provisions of section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges and no others at the premises for which issued during the year for which issued.

* * * * * * * * * *

(d) Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license and to export such alcoholic beverage.

* * * * * * * * *"

insofar as it refers to a person who imports, receives or possesses beer brought into the State of California from outside said State.

(e) That portion of Section 7 thereof reading as follows:

"Each license issued under this act shall be issued to a specific person, and * * * shall be issued for a specific location, the principal address of which shall

be indicated on the license. Separate licenses shall be issued for each of the premises of any business establishment having more than one location.

* * * * * * * * *

Each license issued under this act is separate and distinct, shall be nontransferable from one person to another, and shall be transferable from the premises for which issued only as may be permitted by the board, upon payment of a transfer fee of five dollars for each license.

* * * * * * * * *"

insofar as it applies to or refers to a beer importer's license for a person who is the first in possession of beer brought into the State of California from outside said State.

(f) Section 49 thereof, which reads:

"Common or private carriers shall transport alcoholic beverages into the State only when such alcoholic beverages are to be consigned to a licensed importer. The carrier must obtain the receipt of such importer for the alcoholic beverage so transported and delivered and, if the consignee refuses to give a receipt and show his importer's license to the carrier, the carrier shall be relieved of all responsibility for delivering said alcoholic beverage. Where the consignee is not a licensed importer the carrier shall immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and address of the consignor and consignee and within ten days such alcoholic beverage shall be summarily forfeited to the State of California and shall be turned over to the board for sale at public auction."

insofar as it refers to the transportation, importation, carriage or delivery of any beer into the State of California from outside said State, or the duties of any carrier in respect thereto, and insofar as it purports to provide for the forfeiture of any beer.

(g) Sections 10 and 11 of said Act insofar as said sections refer to a beer importer's license for a person who imports, receives or possesses beer brought into the State of California from outside said state.

(h) Section 31 of said Act, insofar as said section applies to beer importers' licenses, or the license fee therefor.

2. The District Court erred in finding and holding that subdivisions a, b, d, and e, or any or either of them, of Rule 9 promulgated by the State Board of Equalization (appellant here) under and by virtue of the terms of the California Alcoholic Beverage Control Act are invalid, void and unconstitutional insofar as the same apply to a person who imports, receives, or possesses beer brought into the State of California from outside said State, or purport to limit the shipment or delivery of such beer to the holder of a beer importer's license.

3. The District Court erred in finding and holding that the aforesaid provisions of the California Alcoholic Beverage Control Act, or any or either of such provisions, impose any discriminatory burdens upon plaintiffs (appellees here) in their business of importing into the State of California in interstate commerce beer manufactured without said State, and that the same constitute unlawful

burdens upon interstate commerce in violation of the Constitution of the United States.

4. The District Court erred in finding and holding that the aforesaid provisions of the California Alcoholic Beverage Control Act, or any or either of them, are not a valid exercise of the police powers of said State.

5. The District Court erred in finding and holding that the classification of importers under the California Alcoholic Beverage Control Act as a class distinct from others engaged in the liquor business is unreasonable and arbitrary, and unlawfully discriminates between wholesalers of beer imported into the State of California and wholesalers of beer manufactured in said State to the detriment of the former.

6. The District Court erred in finding and holding that the imposition of an importer's license at each of plaintiffs' (appellees here) points of distribution is a direct charge upon the beer so imported and upon the prices at which said imported beer may be sold within the State of California, and is a discrimination and charge as against such beer so manufactured outside of the State of California and in favor of the beer manufactured within the State of California.

SUMMARY OF ARGUMENT.

POINT ONE.

Immunity Clause.

Art. IV, Sec. 2, Clause 1 of the U. S. Constitution does not apply to the regulation of intoxicating liquors.

State v. Hodgson, 66 Vt. 134, 28 Atl. 1039. (Affirmed 168 U. S. 262, 273, 18 S. C. 80, 42 L. ed. 461.)

Neither does it apply to citizens of the State (appellees) whose statute is attacked.

Bradwell v. Illinois, 83 U. S. 130, 138, 21 L. ed. 442;

Bozeman v. State, 7 Ala. App. 151, 61 So. 604;

Hawkins v. Hawkins, 350 Ill. 227, 183 N. E. 9.

POINT TWO.

Fourteenth Amendment.

Intoxicating liquors and the regulation and control thereof do not come within the protection of the 14th Amendment to the U. S. Constitution.

Bartemeyer v. Iowa, 18 Wall. (U. S.) 129;

Mugler v. Kansas, 123 U. S. 623, 8 S. C. 273, 31 L. ed. 205;

Kidd v. Pearson, 128 U. S. 16, 9 S. C. 6, 32 L. ed. 346;

Crowley v. Christensen, 137 U. S. 91, 11 S. C. 13, 34 L. ed. 620;

Cox v. Texas, 202 U. S. 446, 26 S. C. 671, 50 L. ed. 1099;

Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311, 320, 37 S. C. 180, 61 L. ed. 326;

Crane v. Campbell, 245 U. S. 304, 38 S. C. 98, 62 L. ed. 304;

Barbour v. Georgia, 249 U. S. 454, 39 S. C. 316, 63 L. ed. 704;

Samuels v. McCurdy, 267 U. S. 188, 45 S. C. 264, 69 L. ed. 568;

State v. Parker, 236 Mo. 219, 139 S. W. 453.

POINT THREE.

Commerce Clause.

The provisions of the California Alcoholic Beverage Control Act are not unconstitutional and do not contravene the commerce clause, Art. I, Sec. 8, Clause 3, of the U. S. Constitution because the application and protection of such clause has been removed from intoxicating liquors in the present instance.

The spirit of self government as exemplified in local control of the liquor problem has been constantly voiced by the American people, with the result that Federal legislation has progressively restricted the force of the commerce clause over interstate transportation, finally culminating in the 21st Amendment.

The decision in *Leisy v. Hardin* resulted in the enactment by Congress in 1890 of the Wilson Act. This Act removed the character of interstate commerce from inter-

state shipments of liquor upon completion of delivery and before sale in the original packages, but prohibited the States from exercising any control over such imported liquor not equally exercised over domestic liquor.

The Webb-Kenyon Act, passed by Congress in 1913, designedly omitted all of the prohibitions of the Wilson Act against discrimination by the States between domestic and imported liquors, and prevented the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws.

This last Act prohibited the transportation of liquor into any State when such liquor was intended to be received, possessed, sold, or in any manner used in violation of any law of such State. The States could regulate as well as prohibit, could require inspection and records of shipments and could impose license fees and necessity for permits upon such importations.

Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311, 37 S. C. 180, 61 L. ed. 326;

Seaboard Ry. v. N. Carolina, 245 U. S. 298, 38 S. C. 96, 62 L. ed. 299;

McCormick v. Brown, 286 U. S. 131, 52 S. C. 522, 76 L. ed. 1017.

It had been urged that notwithstanding the fact that the Webb-Kenyon Law removed the ban against discrimination contained in the Wilson Act, nevertheless, if the State recognized liquor as an article of commerce it

might regulate its use and the traffic therein, but the commerce clause still prevented any discrimination.

When it came to a consideration of the wording of the 21st Amendment Senator Glass proposed a change which he said would meet the objection that Congress was undertaking to interfere with interstate commerce between States which recognized liquor as an article of commerce. Congress rejected this proposed change, and proposed the Amendment in the short, simple, concise form in which it was adopted, stating that its purpose was to give a constitutional guarantee that the transportation of intoxicating liquor into any State in violation of its laws shall be forever prohibited.

The effect of the 21st Amendment is to restore to the States their full, original sovereignty to deal with intoxicating liquors within their boundaries as they see fit, free from any restrictions of interstate commerce.

The only instances wherein the commerce clause now has any application to intoxicating liquors is where a State has no laws whatsoever dealing therewith, and to prevent States from interfering with trans-shipments which are not delivered or used within the boundaries of the State.

The presence of the comma in front of the phrase "in violation of the laws thereof", prevents such phrase from being construed to apply only to the preceding word "use".

The laws of California here in question regulate the use and transportation of liquor. Plaintiffs (appellees here) seek to import liquor into California for delivery and use therein and contrary to and in violation of its laws. It was error to enjoin the State officials from preventing such importations upon the ground that such California laws violated the 14th Amendment and the commerce clause of the U. S. Constitution.

POINT FOUR.

Discrimination.

Assuming the commerce clause to be applicable, the provisions of the California Act are not violative of such clause because they do not discriminate against importations of beer.

The lower court erred in treating of wholesalers of imported beer and wholesalers of local beer, a distinction that does not exist, the Act providing for only one classification of "wholesaler" who may deal in either local or imported beer or both.

"Importers" under the Act are comparable to "manufacturers". Each is an original source of beer as first produced within the State. As between these two, each may produce his beer at any one point within the State and sell the same in precisely the same manner upon payment by the manufacturer of a license fee of $750.00, and by the importer of two license fees (importers $500.00 and wholesalers $50.00) aggregating $550.00, or $200.00 less than the manufacturer.

POINT FIVE.

Unsupported Finding.

The finding by the lower court that importer's license fee is a direct charge upon price at which imported beer may be sold and a discrimination against such beer in favor of local beer was wholly unwarranted.

The allegation of the complaint upon which this finding was based was expressly denied by the defendants' return thereto. No supporting affidavits nor evidence of any kind was presented to the Court.

Based upon plaintiffs' claims of amount of beer imported and sold by them the distribution of license fees as item of cost would be so infinitesimal as to be practically unascertainable.

Manufacturers' license fees would enter into cost of local beer in similar manner and larger amount thus eliminating actual discrimination.

Separate licenses for one importer for separate points of importation in State comparable to separate licenses required of manufacturer who desires branch plants at separate points within State and so discrimination is eliminated upon this point.

ARGUMENT.

The constitutionality of the California Alcoholic Beverage Control Act relative to beer imports was attacked by plaintiffs (appellees here) in the court below upon the ground that it violated; (1) the commerce clause (Art. I, sec. 8, cl. 3), (2) the due process and equal protection clause (14th Amendment), and (3) the immunity clause (Art. IV, sec. 2), [see Bill in Equity, par. VIII, R. 10].

Constitutional Provisions Urged.

The conclusions of law of the District Court were that such provisions of the Act and certain rules and regulations of the defendant Board (appellants here) imposed discriminatory burdens upon the importation of beer and are not a valid exercise of the police powers of the State, and constitute unlawful burdens upon interstate commerce in violation of the United States Constitution [4th Conclusion of Law, R. 61].

Lower Court's Conclusions of Law.

In its opinion the lower court stated that these provisions contravene the commerce clause and the equal protection clause of the United States Constitution [R. 40]. We shall proceed to take up these three alleged grounds of unconstitutionality in the reverse of the order first above stated.

Lower Court's Opinion.

The Immunity Clause.

Article IV, section 2, clause 1, of the United States Constitution provides that:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Purpose of Immunity Clause.

The sole purpose of this provision has been held to be to "declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the right of citizens of other states within your jurisdiction." (*Slaughter-house* cases, 16 Wall. 77, 21 L. Ed. 394; *Detroit v. Osborne,* 135 U. S. 492, 10 S. C. 1012, 34 L. Ed. 260.)

Liquor Regulation Not Subject to Immunity Clause.

The regulation of the possession, use, and sale of intoxicating liquors is within the police power of the state and is not one of the privileges or immunities of citizenship within the protection of this provision of the Constitution. (*State v. Hodgson,* 66 Vt. 134, 28 Atl. 1039. Affirmed 168 U. S. 262, 273, 18 S. C. 80, 42 L. Ed. 461.)

The protection designed by this clause has been said to have no application to the citizens of the State whose laws are complained of, so that such citizen may not raise the question that the law of his own State is violative of this clause of the constitution. (*Bradwell v. Illinois,* 83 U. S. 130, 138, 21 L. Ed. 442; *Bozeman v. State,* 7 Ala. App. 151, 61 So. 604; *Hawkins v. Hawkins,* 350 Ill. 227, 183 N. E. 9.)

The District Court made no reference to this alleged ground of unconstitutionality either in its opinion or in its conclusions of law, and we think it is quite apparent that this provision of the Constitution has no direct bearing upon the matters here involved.

Fourteenth Amendment.

The character of the liquor traffic is such that it cannot invoke those constitutional guarantees which protect other personal and property rights. Intoxicating liquors do not come within the protection of the 14th Amendment, nor of Article IV, Sec. 2 of the Constitution, and the right to possess, make, or deal in such liquors is not a privilege or immunity of citizens of the United States, and, therefore, State legislation prohibiting the importation of liquor or restricting or regulating its manufacture, possession, use, importation, or handling, does not violate either this amendment or Sec. 2 of Article IV.

Liquor Not Within Protection of 14th Amendment.

Mugler v. Kansas, 123 U. S. 623, 8 S. C. 273, 31 L. Ed. 205;

Kidd v. Pearson, 128 U. S. 16, 9 S. C. 6, 32 L. Ed. 346;

Crowley v. Christensen, 137 U. S. 91, 11 S. C. 13, 34 L. Ed. 620.

In *Cox v. Texas*, 202 U. S. 446, 26 S. C. 671, 50 L. Ed. 1099, in discussing a statute of the State of Texas, which provided for taxes on sellers of spiritous, vinous, or malt liquors and required an application for a license to be accompanied by a bond, and containing a provision that

the same should not apply to wine produced from grapes grown within the State, the court recognized the discrimination and at page 450 said:

> "It is true that there is granted to the producers and manufacturers of wine from grapes grown in Texas an immunity in respect of that wine which is not granted to other sellers of the same wine. But to that extent alone, favor is shown to a class."

Replying to the contention that this was violative of the 14th Amendment, the court continued at page 451:

> "* * * If the States were restricted by the 14th Amendment only, and saw fit to encourage domestic production, or sought to promote temperance, or to help to secure pure wine, by statutes such as those before us, there would be nothing to hinder them."

The 14th Amendment does not protect liquor acquired prior to the effective date of a law prohibiting its possession.

> *Barbour v. Georgia*, 249 U. S. 454, 39 S. C. 316, 63 L. Ed. 704.

Neither does it protect such liquor from seizure and destruction without compensation.

> *Samuels v. McCurdy*, 267 U. S. 188, 45 S. C. 264, 69 L. Ed. 568.

A statute requiring a licensed pharmacist to procure a druggist's license in order to use liquor in the preparation of prescriptions is not violative of this Amendment.

> *Gray v. Conn.*, 159 U. S. 777, 15 S. C. 95, 40 L. Ed. 80.

In *Southern Express Co. v. Whittle,* 194 Ala. 406, 69 So. 652, an Alabama statute was upheld making it unlawful to bring liquor into the State.

A Missouri statute requiring manufacturers and dealers in liquor to take out a license except in respect to wines and spirits produced from grapes or fruits grown within the State was said not to violate the 14th Amendment.

State v. Parker Distilling Co., 236 Mo. 219, 139 S. W. 453.

In *Clark Distilling Company v. Western Maryland Ry. Co.,* 242 U. S. 311, 37 S. C. 180, 61 L. Ed. 326, the Court had under consideration a West Virginia Statute prohibiting the manufacture, sale, and possession of liquor, but not prohibiting the use thereof, unless that might be implied from the other prohibitions; and replying to the contention that the Statute was repugnant to the Fourteenth Amendment, said (page 320):

> "That government can, consistently with the due process clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that there goes along with this power full police authority to make it effective, is also not open. Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use was permitted. This being true, there can be no doubt that the West Virginia prohibition law *did not offend against the due process clause of the Fourteenth Amendment.*"

Liquor Regulation Is Outside 14th Amendment.

In 1915 the State of Idaho had enacted a statute making it a penal offense "for any person to import, ship, sell, transport, deliver, receive, or have in his possession, any intoxicating liquors except as in this Act provided". Plaintiff Crane was arrested for having "in his possession a bottle of whiskey for his own use and benefit, and not for the purpose of giving away or selling the same to any person." He sued out a writ of *habeas corpus* and challenged the validity of the statute upon the ground that it contravened the Fourteenth Amendment. It came before the Supreme Court in *Crane v. Campbell,* 245 U. S. 304, 38 S. C. 98, 62 L. Ed. 304, and on pages 307 and 308, this Court answered such challenge as follows:

> "It must now be regarded as settled that, on account of their well known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. Bartemeyer v. Iowa, 18 Wall. 129; Beer Company v. Massachusetts, 97 U. S. 25, 33; Mugler v. Kansas, 123 U. S. 623, 662; Crowley v. Christensen, 137 U. S. 86, 91; Purity Extract Co. v. Lynch, 226 U. S. 192, 201; Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, 320, 321; Seaboard Airline Ry. v. North Carolina, *ante,* 298.
>
> "As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. Booth v. Illinois, 184 U. S.

Crane v. Campbell, 245 U. S. 304, 307.

425; Sills v. Hesterberg, 211 U. S. 31; Murphy v. California, 225 U. S. 623; and Rast v. Van Deman & Lewis Co., 240 U. S. 342, 364. And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.

"We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge."

In view of the repeated and emphatic declarations of the highest Court of our land, an attack upon liquor laws as being in violation of the Fourteenth Amendment to the Federal Constitution hardly seems to merit serious consideration at this late date.

COMMERCE CLAUSE.

State's Right to Control Liquor.

The primary point to be determined here is the right of a State to control and to deal with its own liquor problem and in connection therewith, to prohibit or regulate the importation of liquor entirely free from any restrictions of the commerce clause of the Constitution of the United States.

The State of California enacted a statute known as the Alcoholic Beverage Control Act embodying a comprehensive system for the control and regulation of the use of and traffic in liquor within its borders. As a part of this system it sought to control all liquor at its source by

licensing all manufacture thereof within the State and all importation thereof into the State.

The lower court held that such provisions of the Act regulating importation of liquor were invalid as contravening the commerce clause of the Federal Constitution. Assignments of error 1, 2, 3, and 5 bear upon this question.

It is, of course, conceded that by the commerce clause, Article I, Section 8, clause 3, Congress was given complete and exclusive power and authority to regulate commerce between the several States. It remains to be seen how far Congress has waived its power in favor of the State, or has had such power abridged by subsequent constitutional amendments in the matter of intoxicating liquors.

Vicious Nature of Liquor Traffic.

It is an admitted fact that the people of this Nation have from the very beginning recognized the vicious danger lurking in the liquor traffic and the menacing character of that business, and have constantly striven to regulate and curb such traffic to the extent that it has always been absolutely prohibited in some portions of our country and for a time was so prohibited throughout the entire Nation.

Local Self-Government in Liquor Control.

The principle of local self-government has ever been popular with the American people. The wisest, most courageous, far-seeing, and constructive leadership these United States have ever enjoyed evolved from the local self-government of the New England town meeting and the burgesses of Virginia. And this principle of local self-government has never been more constantly exercised nor more zealously guarded than in its application

to the regulation of liquor, as is witnessed by the continuous existence of local option. To fully appreciate the removal of the regulation of the liquor traffic from without the confines of the commerce clause of the Constitution and to consider the various steps whereby the States have been restored to their complete sovereignty insofar as their power to control such liquor traffic is concerned requires some consideration of the historical progress by which these results were achieved. We have attempted to present such historical review in the appendix hereto, and we shall only briefly comment upon the same here.

Early in the history of our National government, certain of the New England States had enacted license laws requiring all persons engaged in the sale of intoxicating liquors within such States to be licensed in accordance with the terms of such statutes. In 1847 these statutes came before the Supreme Court of our land in what is known as the License cases. Chief Justice Taney wrote the leading opinion in the case. He took the position that while a shipment of liquor into a State came within the purview of the commerce clause of the Constitution and would, therefore, ordinarily be under the control of the Federal government, nevertheless, when Congress had not acted and had not assumed any control over the matter, it then remained within the power of the State, in the exercise of its police power, to control the sale of such liquor. Accordingly the Chief Justice upheld the license laws of those States on the theory that the police powers of the State should remain in force unless and until Congress had actually taken charge of the subject by legislating upon it.

License Cases.

That decision of our Supreme Court remained the law of the land for forty years. During that period more and more States adopted similar measures for exercising control of the liquor traffic and limiting the shipments of liquor into the State, and the system of such local State control became quite widespread.

In 1886 the State of Iowa passed a law forbidding common carriers to bring intoxicating liquors into that State, unless they were first furnished with a certificate that the consignee thereof was authorized to sell the same. This would have been a valid statute under the decision in the License cases because Congress had never legislated upon the subject and Iowa was simply exercising the police power which had been allowed to New Hampshire and the other New England States under the decision of Chief Justice Taney. But when this statute came before the Supreme Court in *Bowman v. Chicago, etc Ry. Co.*, 125 U. S. 465, in 1887, that Court directly repudiated the doctrine enunciated by Chief Justice Taney in the License cases and substituted the doctrine, as succinctly expressed by Chief Justice Field, at page 507, that:

Doctrine of License Cases Repudiated in Bowman v. Chicago Ry., 125 U. S. 465, 507.

> "The absence of any law of Congress on the subject is equivalent to a declaration that commerce in that matter shall be free."

Very shortly after the decision in the *Bowman* case another prohibition statute of the State of Iowa came before the Supreme Court in the case of *Leisy v. Hardin*, 135 U. S. 100. The theory of the former case was extended to afford the protection of the commerce clause to the *sale* of the imported liquor, the Court saying at page 124:

Leisy v. Hardin, 135 U. S. 100.

"Under our decision in Bowman v. Chicago, etc. Ry. Co. supra, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State."

But in this latter case the Supreme Court expressly indicated that the right of local control, which the State desired, should be sought from Congress, stating at page 108 that:

Supreme Court Suggests That Congress May Act.

"* * * A subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, *unless placed there by Congressional action.*"

And again at page 109:

"* * * Interstate Commerce * * * must be governed by a uniform system, so long as Congress does not pass any law to regulate it, *or allowing the State so to do,* * * *"

Congress lost no time in acting upon this suggestion of the Supreme Court and in less than six months after this decision Congress had enacted the Wilson Act. As originally introduced, this Bill unreservedly granted to the States complete power to prohibit, regulate, control, and otherwise govern the transportation of liquor into such States from beyond their several boundaries, wholly free from any limitations of the commerce clause.

It was recognized that this bill in its original form, left the States free to regulate the liquor traffic to the extent of protecting their domestic liquor industry against

Congress Deliberately Acts to Prevent Discrimination.

the competition of other States. Congress deliberately determined to prevent such discrimination, and in the final enactment provided for the control by the State of the liquor traffic "to the same extent and in the same manner as though such liquid or liquors had been produced in such State * * *."

It is unnecessary to comment upon the various decisions of the courts in construing the Wilson Act, many of which are set forth in the appendix hereto, other than to say that it was firmly established that under the provisions of the said Act, the protection of the commerce clause of the Federal Constitution was removed from intoxicating liquors as soon as delivery was made by the carrier to the consignee, and that thereafter such liquor came under all of the regulations of the State, provided, however, that such State could not discriminate against such imported liquors in any way, but must treat them in the same manner as all other liquors within the State.

Effect of Wilson Act.

The effect of these decisions, disclosing that the Wilson Act did not completely prohibit the importation of liquor, and a realization of the opportunity thus afforded unscrupulous persons to evade local liquor regulations, combined with the resultant growing public conviction that it was an abuse of the interstate commerce privilege to thus permit this means of frustrating the people's wishes, and above all, the ever-present and unquenchable desire on the part of the American citizenry to be free to exercise complete self-government in the control of liquor and the regulation of

Shortcomings of Wilson Act Drive Congress to Further Action.

Webb-Kenyon Act.

its traffic, again forced this problem upon the attention of Congress and resulted in the Webb-Kenyon Act.

As originally introduced, this legislation contained a second section in exactly the same wording as the Wilson Act, prohibiting any discrimination by the State and subjecting the imported liquors to the control of the State law only "to the same extent and in the same manner as though such liquids or liquors had been produced in such State."

After extended debate in Congress upon the question of retaining or striking out this second section, and thus prohibiting discrimination by the State, or permitting the same, Congress decided to give the State complete self-control of its liquor problems and the right to discriminate if it chose so to do, by completely eliminating the second section; and the Webb-Kenyon Act was enacted in its present form in 1913. It is also to be noted that this Act was passed over the veto of President Taft and in the face of his veto message distinctly informing Congress that the effect of the Webb-Kenyon Act was:

Congress Advisedly Discards Prohibition Against Discrimination.

> "To permit the States to exercise their old authority before they became States, to interfere with commerce between them and their neighbors."

The history of these two Acts thus affords a striking contrast. The Wilson bill, as originally introduced, contained no clause or reservation preventing discrimination against imported liquors, but was amended so as to expressly include such prohibition against discrimination. On the contrary, the Webb-Kenyon Act began its legislative life with its second section containing all of the prohibitions of the Wilson Act against discrimination, but this was expressly rejected by Congress and the Act finally enacted without any such reservation, even in the face of a Presidential veto emphasizing that very point.

Contrast Between Wilson and Webb-Kenyon Acts.

The Webb-Kenyon Act is the Congressional prototype of the Twenty-first Amendment, and the decisions of the courts in construing and applying it are particularly apt in the present instance. Probably the leading and most widely cited of these cases is that of *Clark Distilling Co. v. Western Maryland Ry.*, 242 U. S. 311. In clear and simple language, the Court there at page 321 defines the purpose of the act, and after discussing it in comparison with the Wilson Act, said of the Webb-Kenyon law:

Clark Distilling Co. v. Western Maryland Ry. Co.

> ". . . Its purpose was to prevent the immunity characteristic of interstate commerce from being used to prevent the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment,

receipt and possession to be applicable and controlling irrespective of whether the law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears since if that be not true, the coming into being of the act is wholly inexplicable."

That case, but for the fact that the West Virginia statute prohibited the importation, except in certain instances, instead of licensing it, was very similar in principle to the present case. The same arguments were advanced and the same line of reasoning was urged by the Distilling Co. there as urged by plaintiff below and followed by the lower Court here, to-wit, that (page 314):

Similarity to Present Case.

"Where the State law permits the citizen to purchase liquors, carry them to his home, keep them there for personal use and use them, a law which punishes the receipt of liquor for personal use from a common carrier is not a police measure authorized by the Webb-Kenyon law, but is, in so far as it applies to interstate shipment, a law regulating commerce in violation of the commerce clause of the Constitution."

Adams Express Co. v. Kentucky.

The language of the Court in *Adams Express Co. v. Kentucky*, 238 U. S. 190, as found on page 202:

"It therefore follows, that, inasmuch as the facts of this case show that the liquor was not used in violation of the laws of the State of Kentucky, as such laws are construed by the highest Court of that State, the Webb-Kenyon law has no application and no effect to change the general rule that States may not regulate commmerce wholly interstate."

has sometimes been used as authority for the contention that if the State law does not prohibit the use of liquor entirely, it cannot regulate its importation, as the Webb-Kenyon law would have no application, except in those instances where its use was so prohibited.

Adams Exp. Co. Case Limited.

Such a construction of the decision in the *Adams Express Co.* case was, however, directly refuted in the *Clark* case, where the Court said, referring to such a contention (page 324):

> "All that was decided in that case was that as the Court of last resort of Kentucky into which liquor had been shipped had held that the State statute did not forbid shipment and receipt of liquor for personal use, therefore, the Webb-Kenyon Act did not apply, since it only applied to things which the State law prohibited."

To further emphasize this point, this Court continuing in its opinion in the *Clark* case referred to the case of *Van Winkle v. the State,* 27 Delaware 578. The law in Delaware did prohibit shipment of liquor into local option territory, and the Supreme Court of that State in the case referred to had held that the Webb-Kenyon law did not apply because the State law did not prohibit the use of such liquor, and cited the Kentucky case of *Adams Express Co. v. Commonwealth,* 154 Kentucky 462.

Van Winkle v. State Repudiated.

This Court directly disagreed with the *Van Winkle* decision and stated (page 325) that:

> ". . . It necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction

of liquor into a State for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by State law."

The language of the *Clark* case was reiterated in *Seaboard Airline Ry. v. North Carolina,* 245 U. S. 298, 303. The North Carolina law did not prohibit, but did restrict, the use of and traffic in liquors, and it contained a provision requiring all carriers transporting any liquors to keep certain records thereof open for inspection. It was held that a shipment from without the State was not free from this restriction because within the protection of the commerce clause, as the Webb-Kenyon Act had removed that protection. Other than being a burden upon such interstate commerce, it does not appear that there was any discrimination, as this requirement appears to have applied equally to intrastate as well as interstate transportation.

The Reed Amendment enacted in 1917 by Congress and the Eighteenth Amendment to the Constitution effective in 1920 do not throw any light upon the question here before us, other than as they evidence the continuous, ever present pressure on the part of the American public for stringent regulation of and a tight curb upon the liquor traffic.

In 1932 in the case of *McCormick & Co. v. Brown,* 286 U. S. 131, this Court, through its present Chief Justice, declared that the Webb-Kenyon Act was still in effect and had not been repealed by the Eighteenth Amendment nor the National Prohibition Act. The Court there upheld another West Virginia statute heavily restricting, but not prohibiting, liquor traffic and requiring

McCormick v. Brown.

non-residents to take out a permit at an annual fee of fifty dollars before selling or furnishing any liquor to any place within that State. If any doubt remained as to the extent of the application of the Webb-Kenyon Act in removing the protection of the commerce clause from interstate liquor shipments, it was removed by the opinion of the Court in this case. At page 143 it is said:

> "The appellants make the further point that the Webb-Kenyon Act applies only where there is an intent to violate the laws of the State into which the shipment is made. . . . The argument is that no intent to violate the laws of West Virginia can be imputed to the appellants. It is said that they ship their product only to licensed dealers in West Virginia, that is, to those who are authorized by State Commissioner of Prohibition 'to receive, store, and sell the same.' The short answer is that the State law does not make permits issued to [illegible]ealers a substitute for the permits required of wholesale dealers. If the provision of the State law, and the regulations under it, which expressly require State permits for sales by wholesale dealers of the products in question, are valid, it necessarily follows that sales by appellants of these products without such permits would be in violation of the State law within the meaning of the Webb-Kenyon Act. The appellants in making the sales are obviously interested persons, and the shipment of their products into the State for the purpose of there consummating their sales without prescribed permits would fall directly within the terms of that act."

On March 22, 1933, while the Twenty-first Amendment was pending before the States for ratification, Congress passed the Collier act, which provided that certain beverages, including beer, "may be divested of their interstate character in certain cases, the shipment or transportation thereof in any manner or by any means whatsoever from one State . . . into any State . . . in violation of the laws thereof . . . is hereby prohibited." This act was repealed in 1935 after the adoption of the Twenty-first Amendment, and is not particularly pertinent here, except as again manifesting the continuous agitation in and purpose of Congress to permit the States to completely control the liquor traffic without any interference arising out of the commerce clause.

Collier Act.

This brings us to a consideration of the Twenty-first Amendment to the Constitution effective Dec. 5, 1933, and which is now the supreme law of the land upon this subject. As such Amendment was originally proposed in Congress in December, 1932, it provided for the abrogation of the commerce clause of the Constitution as regards liquor *only* in those States where "if the laws in force therein *prohibit* such transportation or importation". When it came out of the Senate Judiciary Committee it had been entirely rewritten and was in precisely its present form, with the exception that it contained an additional paragraph, number 3, which provided that:

Congressional History of 21st Amendment.

> "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold."

This section was eliminated by Congress before submission to the States, principally upon the ground that it was an effort to continue the power of Congress to participate in the control of the liquor traffic and was out of keeping with the spirit of the proposed amendment and the demand of the people that the State be allowed full and complete self-government and control in so far as liquor and the regulation thereof is concerned without any interference on the part of Congress or the Federal Government.

There was not the slightest question as to the purpose and intent of this Amendment in the minds of anyone.

Senator Blaine.

Senator Blaine, representing the Judiciary Committee, referring to the present second paragraph of the Amendment, said (Vol. 76, Cong. Rec., p. 4143):

> ". . . The purpose of Section 2 is to restore to the States by Constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the State . . ."

Senator Glass' Proposal.

Senator Glass of Virginia offered an amendment restricting the application of the proposed Constitutional amendment to strictly prohibition States, and in explanation of this, the Senator said at page 4219 of the same volume:

> "So, I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors; . . ."

Thus, it will be seen that Congress had squarely before it the question of whether or not it should propose a Constitutional amendment (1) completely removing the protection of the commerce clause from the shipment of liquor into States, when such shipment would be contrary to any law or regulation of such State; or (2) an amendment merely forbidding interstate shipments into prohibition States, but retaining the protection of the commerce clause over such interstate shipments into States which recognized liquor as an article of commerce and merely regulated it but did not prohibit the same. Congress chose the *former* and in the language of Mr. Rep. McSwain, "the proposed amendment" is "to give a constitutional guarantee that the transportation or importation into any State of intoxicating liquors, in violation of the laws of such State, shall be prohibited forever".

Congress Squarely Decides Upon Complete State Control.

We have commented upon the history of this Amendment only to emphasize the very emphatic manner in which Congress demonstrated its intent to restore to the several States their full sovereignty in the control and handling of the liquor problem, for it seems to us that the language of the Amendment of itself is so plain that "He who runs may read".

As was said by Mr. Justice Day in the *Adams Express Co. case,* 238 U. S. 190 at page 199:

> "It is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used. If that is plain there is an end to construction and the statute is to be taken to mean what it says."

The contention heretofore urged that the inhibition against transportation or importation applied only when the use of such liquor was in violation of the laws of the State and not only when the transportation itself was in such violation finds no support in this Amendment, and, in fact, is impossible in the face of the language and composition used.

Phraseology of Amendment Allows of But One Construction.

If the phrase "in violation of the laws thereof" were intended to qualify or restrict the phrase "for delivery or use therein of intoxicating liquors", or any part thereof, alone, it would not be separated from it by a comma, but would follow without any intervening punctuation. This intervening comma is obviously inserted to prevent the phrase "in violation of the laws thereof" from referring to or restricting only the "delivery" or "use" or the phrase "for delivery or use therein of intoxicating liquors".

The compound subject "transportation or importation" is what is prohibited. Such transportation or importation is prohibited when the same is "in violation of the laws" of the State, or any manner contrary to any such law or laws. Such transportation or importation, in order to be prohibited, must further be for use or delivery within the State. This Amendment does not permit the State to interfere with shipments of liquor from points without the State to points beyond the State; in other words, the protection of the commerce clause still clings to such shipments made across or through a State, when the same are not delivered or used therein.

As set forth in our appendix hereto, the extent to which the Twenty-first Amendment has removed intoxicating liquors from the protection of the commerce clause has been passed upon by the District Courts of the United States in eight instances, in one of which, Georgia, we are not advised of the purport of the decision. In four of such decisions, it was squarely and emphatically held that if the shipment of liquor into the State in any manner contravened any of its laws, it was prohibited by this Amendment. In two of such decisions, including the one from which this appeal is being prosecuted, it was held that the Twenty-first Amendment did not apply to those States that recognized liquor as an article of commerce and did not absolutely prohibit its use and the traffic therein. The Court in the *Triner* case declined to pass upon this point, and rested its decision entirely upon a violation of the Fourteenth Amendment. It seems to us that an examination of these several opinions discloses that considerably more forceful reasoning is used and extended consideration given the subject in the four cases in which the Twenty-first Amendment is held to remove importation of liquor from the protection of the commerce clause where such importation in any manner violates any law of the State, than in the other decisions where such Amendment is held not to apply if the State recognizes liquor as an article of commerce in any way at all.

District Court Decisions Construing 21st Amendment.

Triner v. Arundel, 11 F. Supp. 145.

Without in any way attempting to criticize the opinion of the lower Court in the present case, we should like to

point out what appears to us to be the somewhat meager consideration apparently given to this question there. It is said to have been the contention of the defendants (appellants here) that "since the adoption of the Twenty-first Amendment to the United States Constitution, neither the commerce clause nor the equal protection clause of the United States Constitution applies to intoxicating liquors". If such was the understanding of our contention in the Court below, it was either a misapprehension or the result of inaccuracy in our statements. To state our position more accurately and with greater particularity, it is, that the commerce clause does not apply to intoxicating liquors when shipments thereof are made into a State for use or for delivery in such State, and when such shipments are in some manner contrary to some law or regulation of that State. If such liquor were merely being transported across or through such State, the commerce clause would still protect it from any interference on the part of that State; and if the shipment of liquor into a State in nowise conflicted with any of its laws or regulations or if the State had made no laws or regulations whatsoever pertaining to liquor, such shipment would then remain within the protection of the commerce clause. The statement in the *Triner* case, quoted as authority for its position by the lower Court in the instant case [R. 36], does not hold such position as just stated untenable, but only declares that the Twenty-first Amendment does not exempt *all* liquor from the influence of the commerce clause without further qualification. It is in its failure to keep before it and to recognize this distinction which

Comment on Opinion of Lower Court in Present Case.

Statement of Appellants' Position.

we have indicated, that the lower Court in the instant case in our opinion erred.

This distinction was recognized by the District Court of Missouri in the *Becker* case; and in holding that a State law discriminating between wholesalers of local and of imported liquors was valid because the Twenty-first Amendment had removed such imported liquors from the protection of the commerce clause, it stated that this conclusion was in complete accord with the statement of the Court referred to above in the *Triner* case. The Court here said "that the amendment does recognize the authority of the State to regulate the movement of liquor into the State, and where availed of, the importation of intoxicating liquors in violation of local law is outside the commerce clause."

General Sales & Liquor Co. v. Becker, 14 F. Supp. 348.

The Court below in the instant case, apparently resting upon the quotation from the *Triner* case above mentioned, and without further discussion, concluded that the Twenty-first Amendment had no application to the present case. It then proceeded to discuss and consider the regulations upon importation as a matter of discrimination entirely apart from the liquor characteristics. The cases relied upon by the lower Court in this connection, *Darnell & Son v. Memphis,* 208 U. S. 113, related to logs and lumber. *Guy v. Baltimore,* 100 U. S. 434, related to a cargo of potatoes. *Webber v. Virginia,* 103 U. S. 344, related to Singer Sewing Machines, and, the only case relating to liquor, that of *Walling v. Michigan,* 116 U. S. 446, was decided in 1885,

Comment on Citations in Opinion of Lower Court.

and subsequent legislation, such as the Wilson Act and Webb-Kenyon Act and the Twenty-first Amendment, have made it an anachronism. The quoted excerpts from the opinion of this Court in *Baldwin v. Selig,* 294 U. S. 511 [R. 39] would be most pertinent and apt if milk, the subject there under consideration, had been removed from the protection of the commerce clause as liquor has been. We call attention, in passing, to the fact that the lower Court nowhere mentioned the Webb-Kenyon Act, nor any of the decisions thereunder.

Premier-Pabst Sales Co. v. McNutt, U. S. D. C. (Ind.) 1-4-35.

The Indiana statute, which the District Court upheld in the *McNutt* case, not only restricted the number of importers but also imposed a license fee of $2,500 upon wholesalers of imported liquor, while wholesalers of local liquor were required to pay only $1,000. The Court there reached its conclusion after considerable discussion of the decisions under the Wilson and Webb-Kenyon Acts. It also referred to a decision of the State involving the same statute in *Fry v. Rosen,* 198 N. E. 375, in which such Court had said that "a vendor of alcoholic malt beverages who does business outside of Indiana has no right or privilege to transport such beverages into Indiana by reason of any protection afforded by the interstate commerce clause of the Federal Constitution." Attention was directed to the fact that an appeal was prosecuted from that decision to the United States Supreme Court, which latter Court dismissed the same upon the grounds that the jurisdictional statement failed to disclose any properly presented substantial Federal question (*Rosen v. Fry,* 296 U. S. 526, 55 S. C. 143, 79 L. ed. 636), al-

though paragraph 4 of such jurisdictional statement stated that it was the contention of appellant that this provision of the act was repugnant to the commerce clause and to the Fourteenth Amendment.

Premier-Pabst Sales Co. v. Grosscup, 12 F. Supp. 970.

The Pennsylvania statute under consideration in the *Grosscup* case, and which was upheld by the District Court and affirmed on appeal by this Court, May 18, 1936, 56 S. C. 754, but without passing upon this question, levied a license fee of $400.00 upon distributors of local beer and $900.00 upon distributors of imported beer.

General Sales & Liquor Co. v. Becker, 14 F. Supp. 348.

In the *Becker* case the Missouri statute exacted the same annual license fee from a non-resident wholesaler as from the resident wholesaler, but permitted the resident wholesaler to sell direct to retailers and others, while restricting the non-resident wholesaler to sales only to or through other wholesalers and not directly to retailers. In this case the District Court recognized and commented upon the impossibility of the State's ability to regulate liquor if it were not to have control of importation, and held that a distinction between domestic and imported liquors was wholly justifiable and not discriminatory.

Blum & Co. v. Henry, (Wis.) 3-28-36.

The Wisconsin statute under consideration in the case of *Blum v. Henry* was very similar to the Missouri statute just mentioned, in that the license fee was the same for both residents and non-residents. Such license, however, permitted the non-residents to sell only to manufacturers or wholesalers, whereas the same license permitted the residents to sell to anyone.

The District Court there immediately put the query:

> "Can it be possible that the language of the Amendment may be so ignored that Congress may still regulate interstate commerce in intoxicating liquor,—by authorizing transportation to any State, notwithstanding interdiction by the State?"

It answers its own query by stating that such contention is repugnant to the plain words of the Amendment. That Court also recognized the necessity of regulating the importation of liquor and the necessity of a distinction between "importers" and local dealers and said:

> ". . . In order to deal properly with those who traffic both from without and within the State, a classification between those two groups of traffickers cannot *prima facie* be called arbitrary or unreasonable or as not germane to the ultimate objective."

Discrimination.

California Act Does Not Discriminate Against Importers.

While it is our contention that the Twenty-first Amendment removes the mantle of the commerce clause completely from liquor in the instances where such Amendment is applicable, nevertheless, we do not concede that in the present instance any discrimination is made against importers in the California Act.

In the light of universal experience with the difficulties of handling the liquor problem, we believe that it will be conceded by all that no control over liquor traffic can be successfully exercised unless such control may effectively reach the source of all

liquor within the territory in question. With this in mind, it must be equally apparent that there are two fountain heads within the State from which liquor may spring, i. e., the local brewer or manufacturer and the importer. The State of California, recognizing these two sources of liquor, based its system upon the control of all liquor at its source by requiring that every local manufacturer or brewer should be licensed and that every importer should be licensed.

Importer and Manufacturer Are Two Fountain Heads of Liquor in State.

Section 5, subdivision 1 of the California Act (Juris. Stat. 14) fixes a beer manufacturer's license at $750.00 per year, as against a beer importer's license at $500.00 per year. The difference then in the amount of the fee discloses a discrimination of $250.00 per year, not against, but in favor of the importer. The manufacturer's license (Sec. 6, Subdivision a, Jur. Stat. 16) permits the holder to sell such beer to any properly licensed person in the State.

License Fees, Manufacturer $750, Importer $500.

The importer's license only authorizes the holder to import and export liquor and gives no right of sale. Such importer may, however, take out a wholesaler's license which then gives him the same selling privileges as the holder of a manufacturer's license has. Such wholesaler's license costs $50.00, so that now the importer with his wholesaler's license stands upon an equal footing with the manufacturer so far as privileges are

Importer With Wholesaler License Has Same Selling Privileges as Manufacturer.

concerned, and still retains an annual cash discrimination in his favor of $200.00. Inasmuch as Sec. 7 of the Act (Jur. Stat. 18) provides that every license issued shall be for one specific location only, the manufacturer and importer stand upon an equal footing in this respect.

We have then the two original sources from which spring all the liquor within the State standing upon an equal footing, except as to the amount of license fee. The manufacturer, on the one hand, produces his product at his local factory and sells the same to prescribed parties by the payment of an annual license fee of $750.00. The importer, on the other hand, produces his product from without the State and sells the same to the same prescribed parties by the payment of his $500.00 importer's license and his $50.00 wholesaler's license. The only apparent difference or discrimination, if any, exists in favor of the importer to the amount of $200.00 cash per year in the matter of the annual license fees.

Importer Placed Upon Equal Footing With Manufacturer at Cost of $200 Less.

It will be noted that Secs. 23, 25, 26 and 27 of the Act (Jur. Stat., pp. 23-38 incl.), providing for an excise tax upon all beer sold by manufacturers and importers and requiring a bond from such parties together with monthly reports, were not held invalid or unconstitutional by the lower court.

Excise Tax on Imported Beer Not Held Invalid.

It would seem that the lower court failed to draw its distinctions and comparisons as between importers and local manufacturers. Instead, in its opinion [R. 39] it speaks of this discrimination as between wholesalers of imported beer and of locally manufactured beer to the detriment of the former. As a matter of fact, there is no such distinction made by the Act. Sec. 2, subdivision(s), (Jur. Stat. p. 13) defines wholesaler as "every person other than a manufacturer or rectifier who is engaged in business as a broker, jobber, or wholesale merchant, dealing in alcoholic beverages". And, as before noted, the wholesaler's license authorizes the holder to sell to any properly licensed person. There is no distinction made as to whether such wholesaler sells and deals in locally manufactured beer or imported beer.

Lower Court Draws Comparisons Between Wholesalers of Local and of Imported Beer Instead of Between Importers and Manufacturers.

To our mind there appears to be a fallacy in the reasoning of the lower Court in that it compares the importer with the wholesaler and thus arrives at a discrimination as against the former, because of the $500.00 license fee to the importer as against the $50.00 license fee to the wholesaler. This is further apparent by the statement of the lower Court [R. 40] "that there is even less justification for making a distinction, created by the provisions of the statute here in question, between the wholesalers of beer manufactured in California and those who sell beer imported into the State, with respect to the amount charged for the privilege of selling beer". The wholesaler of beer does not stand in a position of comparison or contrast to either the manufacturer or the importer.

Importer and Local Manufacturer Both Serve to Bring Beer Into Being for First Time Within State.

The wholesaler is a mere dealer in beer which he procures from a source of original production within the State, to-wit, either a local manufacturer or an importer. The importer, on the other hand, stands in the same category as a local manufacturer, as one who first produces beer within the State. If this distinction is kept in mind the logical and equitable operation of the California Act is readily apparent.

Tax Upon Foreign Beer Not Object of Act.

It is obvious that the object of the Act under consideration is not to impose any tax upon the beer manufactured in other States while exempting that brewed within the State. The fact that of the two sources of origin within the State, the local manufacturer is charged a fee of $750.00 and the importer only $500.00, demonstrates this fact. The wholesaler can neither manufacture nor import his beer but must procure it from either a local manufacturer or an importer. His license fee is $50.00 regardless of whether he sells local or imported beer. No distinction is made and his one license permits him to sell either or both kinds.

That the lower court disregarded these facts and the plain provisions of the Act is shown by the following statement in the opinion [R. 35]:

> "It is conceded that, under this Statute, a person who engages in business as a 'wholesaler' of beer manufactured in California, pays annually only a $50.00 license tax for each establishment maintained

by him in this state for that purpose, whereas a competing 'wholesaler' of beer which he imports into this state pays a like charge, and in addition is required to pay a further license tax of $500.00 for each establishment maintained by him for the receipt and possession of such imported beer."

As we have already pointed out the foregoing statement shows what we believe to be an altogether incorrect impression of the operation of the Act. The error arises in treating the "wholesaler" and "importer" as one and the same. This is wholly at variance with the terms of the Act which throughout maintains and treats "importers" in a class by themselves wholly separate and apart from "wholesalers".

Erroneous Treatment of Importer and Wholesaler as the Same.

In the above quotation from the opinion of the lower court the wholesaler of local beer is assumed to have purchased the same from a local manufacturer, whereas the wholesaler of imported beer is assumed not to have purchased his beer from an importer but to have imported the same directly himself. In order to draw a true comparison for the purpose of determining if any discrimination exists, the same conditions must be assumed as existing in each instance. If the wholesalers in both cases desire to purchase their beer, one from a local manufacturer and the other from an importer, they each pay the same fee of $50.00 and there is no difference nor discrimination. On the contrary, if such wholesalers each desire to produce their own beer instead of purchasing the same, the wholesaler of local beer would have to manufacture his own beer and pay an additional license fee of $750.00,

True Comparison.

and the wholesaler of imported beer would have to import his own beer and pay an additional license fee of $500.00. Thus we again arrive at practically the same end heretofore stated. The only difference now is the sum of $250.00 which, if it be a discrimination, is not against the wholesaler of imported beer, but is in his favor.

Reymann Brewing Co. v. Brister.

In *Reymann Brewing Co. v. Brister,* 179 U. S. 445, 21 S. C. 201, 45 L. Ed. 69, the effect of an Ohio law was said to be that a domestic manufacturer could sell his liquor in quantities of one gallon or more at the place of manufacture and ship to any part of the state, whereas the foreign manufacturer, having no place of manufacture within the state, was obliged to pay a tax in order to sell his product. The court (page 451) held that this was not objectionable as the disadvantage did not "appear to arise out of any intention on the part of the State Legislature to make a hostile discrimination against foreign manufacturers." It stated that this might have been otherwise if the object of the law had been to impose a tax upon products of other states while exempting similar domestic goods from such taxation.

Unsupported Finding.

(Specification of Error No. 6)

The lower court found as a fact [Finding XV, R. 55]:

> "That the imposition of an importer's license at each of plaintiffs' said points of distribution and all such points of distribution belonging to others similarly situated, is a direct charge upon the beer so imported and upon the prices at which said imported beer may be sold in the State of California, and is a

discrimination and charge as against such beer so manufactured outside of the State of California and in favor of the beer manufactured within the State of California."

Such Finding is assigned as error [Assignment 9, R. 78].

The Finding is in the language of the allegation in the Bill of Complaint [R. 18, 19]. Such allegation is expressly denied by the defendants (appellants here) in their return [R. 28, 29, paragraph X and XI]. Inasmuch as this was heard by the court solely upon the Bill of Complaint and the return thereto and without any supporting affidavits or evidence [R. 31, 32, 42], we maintain that the court was wholly unwarranted in finding this as a fact. It is elementary, requiring no supporting authorities, that a finding upon a controverted issue of fact cannot be sustained in the utter absence of any evidence whatsoever in support thereof.

No Supporting Affidavit Nor Evidence Presented in Lower Court

It will be conceded that technically the amount of the importers' license fee would enter into the cost of beer imported and sold by him. However, if we are to believe the claims and allegations of plaintiffs (appellees here) as to the volume and value of the beer so imported and sold by them, the added cost of the importers' license when distributed over such beer would be so microscopically infinitesimal as to be practically unascertainable.

This finding also assumes the necessity for an importer's license at each point in the State to which such importer may desire to directly ship beer. This, however, is not a necessity but merely a convenience. The local manufacturer operating under one license is under necessity of shipping his product throughout the state from the one point of manufacture, the same as an importer operating under one license.

Several Points of Operation Result Similarly as Between Importers and Manufacturers.

If we are to maintain a parity in condition between the importer and manufacturer, we must consider both operating at a single point, or the manufacturer establishing branch plants at different points within the state the same as the importer desiring to maintain different points of import within the state, in which latter event, the manufacturer would likewise have to take out a license for each of such plants and at a cost of $250.00 greater than the importer in each instance, so that the ratio of *discrimination in the latter* event would greatly increase, not against but in favor of the importer.

Conclusion.

It is our contention that inasmuch as the State of California has enacted laws regulating the use and traffic in liquor, including the transportation and importation thereof, that the Twenty-first Amendment to the United States Constitution has removed the interstate transportation and importation of such liquor from under the protection and application of the commerce clause of such Constitution, and that the provisions of said law relating to importation of liquor do not violate nor contravene any of the provisions of the United States Constitution; and further,

that such provisions do not discriminate against such importation nor cast any burden upon interstate commerce, and do not in any manner contravene the commerce clause of the Constitution.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and that this Court should review the decision of the said District Court of the United States for the Southern District of California, Central Division, and finally reverse it.

U. S. WEBB,
Attorney General of State of California,
WALTER L. BOWERS,
EUGENE ELSON,
Deputies Attorney General,
Counsel for Appellant.

APPENDIX.

Chronology.

August 8, 1890. The Act of Congress known as the "Wilson Act" (Sec. 121, Title 27, Cumulative Supplement, United States Annotated Code 1933, p. 102) became effective. Said Act reads as follows:

> "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

March 1, 1913. The Act of Congress known as the "Webb-Kenyon Act" (Sec. 122, Title 27, Cumulative Supplement, United States Annotated Code 1933, p. 102) became effective Said Act reads as follows:

> "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States,

or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

March 3, 1917. The Act of Congress known as the "Reed Amendment" (Sec. 123, Title 27, Cumulative Supplement, United States Annotated Code, p. 103) became effective. Said Amendment reads as follows:

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be fined not more than $1,000 or imprisoned not more than six months, or both: Provided, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State: Provided further, That the provisions of this section are made applicable to the District of Columbia."

December 5, 1933. Twenty-first Amendment to the Constitution of the United States was declared ratified and thereupon became effective, thereby repealing the Eighteenth Amendment to the Constitution of the United States. Said Amendment reads as follows:

"Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by convention in the several States, as provided in the Constitution within seven years from the date of the submission hereof to the States by the Congress."

November 6, 1934. The people of the State of California adopted an amendment to section 22, article 20 of the Constitution of the State of California which became effective on that date. Said Amendment reads as follows:

"Section 22. The State of California, subject to the Internal Revenue Laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the States shall have the exclusive right and power to regulate the importation into and exportation from the State, of intoxicating liquor. Intoxicating liquors, other than beers, shall not be consumed, bought, sold, or otherwise disposed of for consumption on the premises, in any public saloon, public bar or public barroom within the State; provided, however, that subject to the aforesaid restric-

tion, all intoxicating liquors may be kept and may be bought, sold, served, consumed, and otherwise disposed of in any bona fide hotel, restaurant, cafe, cafeteria, railroad dining or club car, passenger ship, or other public eating place, or in any bona fide club after such club has been lawfully operated for not less than one year. The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, and to collect license fees or occupation taxes on account thereof and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals. It shall be unlawful for any person other than a licensee of said board to manufacture, import or sell intoxicating liquors in this State. Until the Legislature shall otherwise provide, the privilege of keeping, buying, selling, serving, and otherwise disposing of intoxicating liquors in bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and in bona fide clubs after such clubs have been lawfully operated for not less than one year, and the privilege of keeping, buying, selling, serving, and otherwise disposing of beers on any premises open to the general public shall be licensed and regulated under the applicable provisions of the so-called State Liquor Control Act, California Statutes 1933, Chapter 658, in so far as the same are not inconsistent with the provisions hereof, and excepting that the license fee to be charged bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and any bona fide clubs after such clubs have been lawfully operated for not less than one year, for

the privilege of keeping, buying, selling, or otherwise disposing of intoxicating liquors other than beers and wines, shall be $250.00 per year, or $62.50 per quarter-annum for seasonal businesses, subject to the power of the State Board of Equalization to change such fees.

The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of liquor contained in the original packages, where such liquor is not to be consumed on the premises where sold.

The Legislature shall provide for apportioning the amounts collected for license fees or occupation taxes under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper.

All constitutional provisions and laws inconsistent with the provisions hereof are hereby repealed."

June 13, 1935. Act to license, regulate and control the manufacture, transportation, sale, purchase, possession and disposition of alcoholic beverages known as the "Alcoholic Beverage Control Act" being Senate Bill 919, chapter 330, pages 1123 to 1183, Statutes of 1935 of the State of California which was approved and became effective on that date. Said Act in part reads as follows:

"Section 2. The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

. . . . . .

(c) 'Beer' means any alcoholic beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops or any other similar product, or

any combination thereof in water, and shall include ale, porter, brown, stout, lager beer, small beer and strong beer but shall not include sake known as Japanese rice wine.

. . . . . .

(k) 'Importer' means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the act of importation is completed.

(s) 'Wholesaler' means and includes every person other than a manufacturer or rectifier who is engaged in business as a broker, jobber or wholesale merchant, dealing in alcoholic beverages.

Section 3. On and after July 1, 1935, no person shall perform any act or acts which would constitute such person a manufacturer, rectifier, importer, wholesaler, or retailer of any alcoholic beverage within the meaning of this act or shall package, label or sell any alcoholic beverage unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act, or pursuant to the provisions of the State Liquor Control Act, Chapter 658, Statutes of 1933. Any person violating any provision of this section shall be guilty of a misdemeanor.

Section 5. The following are the types of licenses to be issued under this act and the annual fees to be charged therefor:

1. Beer manufacturer's license.....$750.00 per year

. . . . . .

8. Beer importers license..... 500.00 per year

Section 6. Except as otherwise provided in this act and subject to the provisions of section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges and no others at the premises for which issued during the year for which issued.

(a) Any manufacturer's license authorizes the person to whom issued to become a manufacturer of the alcoholic beverage specified in the license, to package, mix, flavor and color and label the same and to export or sell such alcoholic beverages to persons holding licenses issued by the board authorizing the sale of such alcoholic beverage; provided that a wine manufacturer's license authorizes the manufacture of grape brandy to be used exclusively for fortifying purposes by its holder on the premises for which issued.

(d) Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license and to export such alcoholic beverage.

. . . . . .

(f) Any wholesaler's license authorizes the sale of the alcoholic beverage specified in the license only to persons holding licenses issued by the board authorizing the sale of such alcoholic beverage.

Section 7. Each license issued under this act shall be issued to a specific person, and, except in the case of licenses authorizing the sale of alcoholic beverages on trains or boats, shall be issued for a specific location, the principal address of which shall be indicated on the license. Separate licenses shall be issued for

each of the premises of any business establishment having more than one location.

. . . . . .

Each license issued under this act is separate and distinct, shall be nontransferable from one person to another, and shall be transferable from the premises for which issued only as may be permitted by the board, upon payment of a transfer fee of five dollars for each license.

Sec. 10. To obtain a license under this act application therefor, accompanied by the license fee therefor, must be made to the board upon a form prescribed by the board. The application must contain the name of the applicant, and in the case of a copartnership, the names of the individual parties, in the case of a corporation the principal officers and directors, the location of the premises for which a license is applied and such other information as the board may require to assist it in determining whether the applicant and the premises qualify for a license. The board may require that the application for any on-sale license be verified under oath and be endorsed by five freeholders or householders of the city or county in which the applicant resides or the premises are located.

Sec. 11. Upon receipt of an application for a license and the license fee the board shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license. The board must deny an application for a license if either the applicant or the prem-

ises for which a license is applied do not qualify for a license under this act.

If an application is denied, three-fourths of the license fee paid, or an amount equal to the license fee paid less ten dollars, whichever is greater, shall be returned to the applicant and the balance shall be deposited in the alcoholic beverage control fund hereinafter created.

Sec. 49. Common or private carriers shall transport alcoholic beverages into the State only when such alcoholic beverages are to be consigned to a licensed importer. The carrier must obtain the receipt of such importer for the alcoholic beverage so transported and delivered and, if the consignee refuses to give a receipt and show his importer's license to the carrier, the carrier shall be relieved of all responsibility for delivering said alcoholic beverage. Where the consignee is not a licensed importer the carrier shall immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and address of the consignor and consignee and within ten days such alcoholic beverage shall be summarily forfeited to the State of California and shall be turned over to the board for sale at public auction.

Every person violating the provisions of this section shall be guilty of a misdemeanor."

Outline of Constitutional and Legislative Developments in Interstate Shipments of Intoxicating Liquors and the Judicial Decisions in Connection Therewith.

(Note: We are indebted for much of this material to the brief filed by Philip Lutz, Jr., Attorney General of Indiana, in No. 1580, *Premier-Pabst Sales Co. v. McNutt,* U. S. Dist. Crt., Southern Dist. of Ind.)

I.

State's Power Prior to Federal Constitution.

"Previous to the formation of the Federal Constitution the States were sovereign in the full absolute sense of the term."

Sovereignty of State Prior to Federal Constitution.

Spooner v. McConnell, 22 Fed. Cas. #13245;

Ex Parte Guerra, 94 Vt. 1, 110 Atl. 224, 226;

American Coal Mining Co. v. Indiana, etc. Co., 268 Fed. 563, 569 (Appeal Dismissed 258 U. S. 632, 42 S. C. 273, 66 L. Ed. 801);

Thurlow v. Massachusetts, 5 Howard U. S. 504, 587, 12 L. Ed. 256.

1776. The Declaration of Independence refers to the colonies as "free and independent states".

The Colonies in States under the Confederacy repeatedly enacted and enforced their statutes controlling, regulating and prohibiting importation.

Colonial Legislation Regulating and Prohibiting Imports.

The following are a few of the numerous instances thereof:

Virginia in various statutes ranging from 1660 to 1788, prohibited the importation of horses and mares, tobacco and convicts.

Henings' Stats. at Large, Vol. I, page 271;
Vol. II, p. 18, 253, 445;
Vol. IX, p. 530;
Vol. XII, p. 668.

North Carolina enacted similar legislation in 1766. North Carolina Revised Acts, p. 353.

Maryland, likewise, as to exportation. Maryland Statutes at large, 1778.

New Hampshire in 1785. Laws of New Hampshire, Vol. IV, p. 562.

New York, 1784. Colonial Laws of N. Y. Vol. X, p. 11.

Massachusetts, 1675 to 1777. Colonial Laws of Massachusetts, pp. 219, 658.

Georgia, 1770. Colonial Records of Georgia, p. 140.

II.

The Commerce Clause of the Federal Constitution.

1789.
Art. I,
Sec. 8,
Cl. 3.

"The Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

1847.

THE LICENSE CASES
5 Howard (46 U. S.) 504, 586;
12 L. Ed. 256.

Statutes of Massachusetts, New Hampshire, and Rhode Island involving importations of wine from France, and the law of New Hampshire involving a barrel of gin brought from Massachusetts, all requiring a license, were upheld in these cases. Chief Justice Taney said, on page 586:

State Import License Valid Where Congress Has Made No Regulation.

"* * * as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose its interest or duty to pursue."

He added, at page 577:

"I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic or from prohibiting it altogether, if it thinks proper."

WALLING v. MICHIGAN

1885.

116 U. S. 446;
6 S. C. 454;
29 L. Ed. 676.

Walling Case Inapposite Since Wilson Act and Similar Legislation. See Delameter v. S. Dakota, 205 U. S. 93; McCormick v. Brown, 286 U. S. 131.

A license tax was imposed upon persons "soliciting or taking orders from citizens or residents of this State." (Mich.) "for liquors to be shipped into this State," etc.

The court decided that the Michigan law conflicted with the commerce clause and at page 458 said:

"In view of these authorities, especially the decisions of this court on the subject, we have no hesitation in saying that the Act of 1875, under which the prosecution against Walling was instituted, if it stood alone, without any concurrent law of Michigan imposing a like tax to that which it imposes upon those engaged in selling or soliciting the sale of liquors the produce of that State, would be repugnant to that clause of the Constitution of the United States which confers upon Congress the power to regulate commerce among the several States."

III.

Development of Original Package Doctrine.

1887.

BOWMAN v. CHICAGO, ETC. RAILWAY CO.
125 U. S. 465;
8 S. C. 689;
31 Law. Ed. 700.

Original Package Doctrine Applied to Liquors.

Plaintiff sought damages from the defendant carrier for refusing to accept shipments of certain beer from Chicago to Marshalltown, Iowa, as being a violation of the commerce clause. Defendant justified this action under the Iowa statute prohibiting such transportation.

Chief Justice Field in his concurring opinion made a statement of the law (subsequently approved in *Leisy v. Hardin,* 135 U. S. at p. 119) in the *Bowman* case at page 507, as follows:

State Right to Regulate Importation of Liquors Denied.

"* * * where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulation as to interstate commerce with reference to any particular subject, is taken as a declaration that the importation of that article into the State shall be unrestricted."

In the same case in the main opinion the court at page 499 stated:

Right to Sell Imported Liquors Indicated But Not Decided.

"It is easier to think that the right of importation from abroad, and of transportation from one State of another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation, is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of Brown v. Maryland, 12 Wheat 418, as to foreign commerce, with the express statement of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the States. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case. The precise line which divides the transaction, insofar as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the State, we are not now called upon to delineate."

1889.

LEISY v. HARDIN
135 U. S. 100;
10 S. C. 681;
34 Law. Ed. 128.

Plaintiff claimed protection under the commerce law, asserting that the Iowa statutes authorizing the seizure of original packages of liquor shipped in interstate commerce to the plaintiff from Peoria, Ill., was void.

The court, citing *Gibbons v. Ogden,* 9 Wheat 1, and *Brown v. Maryland,* 12 Wheat 419, said of the power of Congress to regulate commerce, at page 108:

> "It is coextensive with the subject upon which it acts and cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered.
>
> And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons, and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action."

Court's Suggestion That Removal of Interstate Commerce Protection From Liquor Lay With Congress.

Continuing, at page 109, the court stated:

> "Yet, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States to do so, it thereby indicates its will that such commerce shall be free and untrammeled."

Referring to the *Bowman* case, *supra,* the court, at page 124, said:

Theory of Bowman Case Extended to Afford Protection of Commerce Clause to Sale of Imported Liquor.

"Under our decision in Bowman v. Chicago, etc. Ry. Co., supra, they had the right to import this beer into that State, and in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer."

IV.

Congressional History of Wilson Bill.

1889.

Public sentiment in this country, constantly aware of the vicious dangers inherent in all intoxicating liquors, and ever alert to guard against the persistent attempts to evade local regulation of the liquor traffic, responded instantly to this invitation of the court to seek protection from Congress. As the direct result of this unqualified ruling in the *Leisy* case, and immediately thereafter, on December 4, 1889, Senate Bill No. 398 was introduced into the United States Senate by Senator Wilson to enable Congress to take advantage of the decision of Chief Justice Fuller in *Leisy v. Hardin,* "referring to the absence of legislation on the part of congress * * * allowing the States" to deal with imported liquors.

1889. Dec. 4.

ORIGINAL FORM OF INTRODUCTION OF WILSON BILL.

"That no state shall be held to be limited or re-restrained in its power to prohibit, regulate, control, or tax the sale, keeping for sale, or the transportation as an article of commerce or otherwise, to be delivered within its own limits, of any fermented, distilled, or other intoxicating liquids or liquors by reason of the fact that the same have been imported into such State from beyond its limits, whether there shall or shall not have been paid thereon any tax, duty, import, or excise to the United States."

Vol. 21, Congressional Record, page 534.

Congressional Debate. Senator Hiscock.

Senator Hiscock immediately called attention to the fact that the Wilson Bill "may be invoked by the Legislature of a State, not for that purpose, but for the purpose of protecting the industries, the distillers, of their own State, the brewers of their own State, the wine-makers of their own State, against those of others, and who doubts it or denies it."

Vol. 21, Congressional Record, page 5090.

Senator Hoar.

Senator Hoar, a great constitutional lawyer, replied to Senator Hiscock (pp. 5090-5091, Vol. 21, Congressional Record,), in part, as follows:

"The senator says that he finds the vice in this bill that it will leave the States of the Union free to undertake to regulate or control the traffic in intoxicating liquors for the purpose of protecting their own industries against the competition of other States or other nations."

Senator Hoar then proposed a provision in the clause reading:

> "provided that such prohibition, regulation, control, or tax, shall apply equally to all articles of the same character wherever produced."

Senator Graves (Vol. 21, Congressional Record, p. 5336), Senator Faulkner (Cong. Rec., Vol. 21, p. 5378), Senator Edmonds (Vol. 21, Cong. Rec. p. 5378), proposed numerous amendments to the Wilson Bill in different language but to the same effect, of limiting the power of the State in the regulation made, so that they would be the same as "affecting or applicable to all other like property."

Senator Wilson.

Senator Wilson also proposed an amendment to prevent such discrimination. (Vol. 21, Cong. Rec. p. 5324.)

A committee amendment was passed determining the final form of the Wilson Act (Vol. 21, Cong. Rec. p. 7427), containing express provisions against discrimination, as appears in the language of the statute ultimately enacted.

1890.

THE WILSON ACT.

Aug. 8.

"An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases.

All fermented, distilled, or other intoxicating liquors or liquids, transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same

extent and to the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Express Provision Against Discrimination.

Congress thus determined that it was necessary to place an express inhibition in the Wilson Act, since otherwise a State could constitutionally enact legislation regulating or prohibiting the importation of out-of-state liquors, to the advantage of its own products, and Congress made a deliberate choice of language from among various proposed amendments, and selected the language to prevent discrimination, to which the Supreme Court later referred in the *Scott v. Donald* case, namely:

> "To the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory."

V.

Decisions Under the Wilson Act.

1891. IN RE RAHRER
140 U. S. 545;
11 S. C. 865;
35 L. Ed. 572.

Rahrer was arrested for violation of a Kansas law prohibiting the sale or barter in any form of intoxicating liquors without first having procured a druggist's permit therefor, because, acting as an agent for a Missouri brewer, he had offered and sold one pint of whiskey in the original package as imported from Missouri into Kansas.

The court determined that the Wilson Act was constitutional, and referring to the *Bowman* and *Leisy* cases said, at page 559:

"The laws of Iowa under consideration in Bowman v. Railway Company, 125 U. S. 465, and Leisy v. Hardin, 135 U. S. 100, were enacted in the exercise of the police power of the State, and not at all as regulations of commerce with foreign nations and among the States, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one State and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence, it was held that inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character and must be governed by a uniform system, so long as Congress did not pass any law to regulate it specifically, or in such way as to allow the laws of the State to operate upon it, Congress thereby indicated its will that such commerce should be free and untrammeled, and therefore that the laws of Iowa, referred to, were inoperative insofar as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the State, or their sale upon arrival, in the form in which they were imported there from a foreign country or another State. It followed as a corollary, that when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.

Freedom of Interstate Transportation as Declared in Bowman and Leisy Cases Contrasted With Change Made by Wilson Act.

Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a State,

fall within the category of domestic articles of a similar nature. Is the law open to constitutional objection?"

And on page 562 the court remarks:

Congress May Remove Interstate Commerce Character From Liquor.

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

1896.

SCOTT v. DONALD
165 U. S. 58;
17 S. C. 265;
41 L. Ed. 632.

The South Carolina Dispensary Act favored the purchase of liquor produced within the State and discriminated against outside liquors by forbidding importation except through certain State functionaries, "and thus those citizens who wish to use foreign wines and liquors are deprived of the exercise of their own judgment and taste in the selection of commodities."

This Is Not Authority for Claim That Wilson Act Applies Only to Prohibition States. See Vance v. Vandercook Co., 170 U. S. 438.,

The Court cheerfully conceded "that the law in question was passed in the bona fide exercise of the police power."

It was further stated that the South Carolina statute was "not a law purporting to forbid the importation, manufacture, sale and use of intoxicating liquors as articles detrimental to the welfare of the State and to the health of the inhabitants, hence it is not within the scope and operation of the (Wilson Act)."

Referring directly to the Wilson Act and its language, at page 100 the Court stated:

Wilson Act Held Not to Permit Discrimination Against Imported Liquor When Prohibition Is Not in Effect.

"That law was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. When that law provided 'that all fermented, distilled or intoxicating liquors transported into any State or Territory, remaining therein for use, consumption, sale or storage therein, should, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise,' evidently equality or uniformity of treatment under state laws was intended. * * * But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

While these decisions unqualifiedly hold that in the local regulation of liquor there can be no discrimination against imports, it seems apparent from the expressions of the Court that this is based entirely upon the language of the Act that such liquors so imported shall

"be subject to the operations and effect of the laws of such State * * * to the same extent and in the same manner as though such liquids or liquor had been produced in such State or Territory."

Theory That States Would Have Had Power to Discriminate Against Imported Liquor If Wilson Act Had Not Expressly Forbidden.

This language of the Court taken in connection with the debate in Congress on the Wilson bill and the amendments made in the course of its passage clearly indicate that the States would have had the power to discriminate against imports if Congress had not taken care to prevent the same by the express provision in the Act.

1898.

VANCE v. VANDERCOOK CO.
170 U. S. 438;
18 S. C. 674;
42 L. Ed. 1100.

As a result of the decision in *Scott v. Donald,* the South Carolina legislature amended its Dispensary Act, eliminating those clauses in the previous statute which had been held to operate as a discrimination, and the amended act permitted shipments to be made from outside States to residents of South Carolina for their own use, but subjected the exercise of such right to certain regulations and restrictions. This amended act was before the Supreme Court again almost immediately when non-residents claimed the right to ship liquor into the State free from any restriction whatsoever. Speaking of the claim that interstate commerce protected the imported liquor until after its sale in the original package, the Court stated that this was no longer applicable to intoxicating liquors (page 445):

"* * * Since Congress in the exercise of its lawful authority has recognized the power of the several States to control the incidental right of sale in the original packages, of intoxicating liquors, shipped into one State from another, so as to enable the States to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in original packages, except in conformity to lawful state regulations. In other words, by virtue of the act of Congress (Wilson Act) the receiver of intoxicating liquors in one State, sent from another, can no longer assert a right to sell in defiance of the state law in the original packages, because Congress has recognized to the contrary."

State May Prevent Sale of Imported Liquor in Original Package.

The claim that the Wilson Act applied only to States that prohibited and not to those that regulated the liquor traffic was directly refuted (p. 447):

"But the premise upon which these arguments rest is purely arbitrary and imaginary. From the fact that the state laws permit the sale of liquor, subject to particular restrictions, and only upon enumerated conditions, it does not follow that the law is not a manifestation of the police power of the State. The plain purpose of the act of Congress having been to allow state regulations to operate upon the sale of original packages of intoxicants coming from other States, it would destroy its obvious meaning to construe it as permitting the state laws to attach to and control the sale only in case the States absolutely forbade sales of liquor and not to apply in case the States determined to restrict or regulate the same."

Wilson Act Applies Where State Regulates Liquor Traffic as Well as Where State Absolutely Prohibits Same.

That the decision in *Scott v. Donald* was not to this effect was also plainly stated at page 448:

Scott v. Donald Not Authority That Wilson Act Applies Only to Prohibition States.

"Nor is the claim well founded that it was decided in Scott v. Donald that the provisions of the act of Congress of 1890 do not apply in any State by whose laws the sale of liquor is not absolutely forbidden, that is to say, that the right exists to sell original packages in violation of the State laws wherever they do not prohibit liquor from being sold under any circumstances."

1898.

RHODES v. IOWA
170 U. S. 412;
18 S. C. 664;
42 L. Ed. 1088.

Liquor shipped into Iowa was seized while the original package was in the carrier's hands, and its agent was prosecuted for violating the Iowa statute by moving it.

"The sole question presented for consideration is whether the statute of the State of Iowa can be held to apply to the box in question while it was in transit. * * *." (p. 414.)

Referring to the *Bowman* case, it is stated at page 419:

Comment on Bowman and Leisy Cases.

"The fundamental right which the decision in the Bowman case held to be protected from the operation of state laws by the Constitution of the United States was the continuity of shipment of goods coming from one State into another. * * *. This protection of the Constitution of the United States is plainly denied by the statute now under review, * * *."

The word "arrival" in the Act is held not to apply at the instant the package crosses the state line, but only when it comes to rest at the end of such transportation. And at page 423 the Court states:

Wilson Act Intended to Allow State Regulation to Attach Before Any Sale, But Only After Consummation of Shipment.

"Light is thrown upon the purpose and spirit of the act by another consideration. The Bowman case was decided in 1888, the opinion in Leisy v. Hardin was announced in April, 1890, the act under consideration was approved August 8, 1890. Considering these dates, it is reasonable to infer that the provisions of the act were intended by Congress to cause the legislative authority of the respective States to attach to intoxicating liquors coming into the States by an interstate shipment, only after the consummation of the shipment, but before the sale of the merchandise, * * *.

"While it is true that the right to sell free from state interference interstate commerce merchandise was held in Leisy v. Hardin to be an essential incident to the interstate commerce, it was yet but an incident, as the contract of sale within a State in its nature was usually subject to the control of the legislative authority of the State. * * * The purpose of Congress to submit the incidental power to sell to the dominion of state authority should not without the clearest implication be held to imply the purpose of subjecting to state laws a contract which in its very object and nature was not susceptible of such regulation even if the constitutional right to do so existed, as to which no opinion is expressed." (p. 424.)

1900. REYMANN BREWING CO. v. BRISTER
179 U. S. 445;
21 S. C. 201;
45 L. Ed. 269.

The Dow law taxed "trafficking in liquors" but not the manufacture nor sale of the same, and this law was construed to apply likewise to any liquors shipped into Ohio. The Court at pages 454 and 455 said:

> "And, of course, it is obvious that such liquors, sold and delivered within the State of Ohio, are within the provisions of the statute of the United States, known as the Wilson law, * * *.
>
> "As this statute, the Wilson Act, subjects intoxicating liquors imported into a State to the operation and effect of the laws of such State only when enacted in the exercise of its police powers, it is contended that such is not the character of the Dow law; that, as it contains no prohibition upon the manufacture or sale of intoxicating liquors, and only purports to regulate the trafficking therein, it is not a police measure * * *

Wilson Act Subjects Imported Liquor to State Regulation as Well as to Prohibition.

> "A similar contention was disposed of by this court in the case of Vance v. Vandercook Co., 170 U. S. 438, 447, * * *."

1904. AMERICAN EXPRESS CO. v. IOWA
196 U. S. 133;
25 S. C. 182;
49 L. Ed. 417.

Speaking of the holding in the *Bowman* and *Leisy* cases that a state law regarding intoxicating liquors could not

be made to apply to shipments from out of such State because of the federal commerce laws, the Court said at page 142:

> "In Rhodes v. Iowa, 170 U. S. 412, the same doctrine was reiterated, except that it was qualified to the extent called for by the provisions of the act of Congress * * * commonly called the Wilson Act."

Speaking further of the Rhodes case at page 142, it was said:

> "The court declined to express an opinion as to the authority of Congress under its power to regulate commerce, to delegate to the State the right to forbid the transportation of merchandise from one State to another. It was, however, decided that the Wilson Act manifested no attempt on the part of Congress to exert such power, but was only a regulation of commerce, since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one State to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original packages."

Liquor Loses Interstate Commerce Character Immediately Upon Delivery to Consignee.

1905.

PABST BREWING CO. v. CRENSHAW
198 U. S. 17;
25 S. C. 552;
49 L. Ed. 925.

A Missouri statute required that all beer and malt liquors, other than those manufactured in the State,

should be inspected by state officials, for which services an inspection fee was imposed, the same as upon the manufacture of beer and malt liquors in the State. It was contended that this was repugnant to the commerce clause, because in this particular it discriminated in favor of beer manufactured in Missouri over that imported from other States. At page 27 the Court said:

> "The purpose of the Wilson Act was to make liquor after its arrival a domestic product, and to confer power upon the States to deal with it accordingly. The police power is hence to be measured by the right of a State to control or regulate domestic products, a state and not a Federal question as respects the commerce clause of the Constitution."

Purpose of Wilson Act.

Referring once more to the claim that the Act applied only to prohibition and not regulation, the court said at page 29:

> "If the purpose of the Act had been to allow the state law to govern the sale of the original package only where the sales of all liquor were forbidden, this object could have found ready expression, whilst, on the contrary, the entire context of the act manifests the purpose of Congress to give to the respective States full legislative authority, both for the purpose of prohibition, as well as for that of regulation and restriction with reference to the sale in original packages * * * brought * * * in from other States."

The argument was made that (page 30):

Fact That State Regulations Are Burden on Interstate Commerce Does Not Render Such State Liquor Regulation Invalid.

"As the burdens which the statute impose were of such character as to affect traffic in the articles and hence operate to deter shipments into Missouri, therefore the statute must be treated as if it bore upon the liquor while still in transit as a subject of interstate commerce."

The Court answered this contention by stating, on the same page:

"This proposition simply amounts to contending that the Wilson Act should be disregarded, since to enforce it would give the State power to regulate interstate traffic in liquor. If when a State has but exerted the power lawfully conferred upon it by the Act of Congress, its action becomes void as an interference with interstate commerce because of the reflex or indirect influence arising from the exercise of the lawful authority, the result would be that a State might exert its power to control or regulate liquor, yet if it did so its action would amount to a regulation of commerce and be void. And this would be but to say at one and the same time that the power could and could not be exercised. But the proposition would have a much more serious result, since to uphold it would overthrow the distinction between direct and indirect burdens upon interstate commerce by means of which the harmonious workings of our constitutional system has been made possible."

1906.

DELAMETER v. SOUTH DAKOTA
205 U. S. 93;
27 S. C. 447;
51 L. Ed. 724.

The laws of South Dakota "imposed an annual license charge 'upon the business of selling or offering for sale' within the State 'by any travelling salesman who solicits orders by the jug or bottle in lots less than five gallons'." Delameter, who had taken out no license, solicited orders for shipment into the State in violation of this law, and was prosecuted under its criminal provision. At page 98 the Court said:

> "We are hence called upon only to consider whether the general power of the State to control and regulate the liquor traffic and the business of dealing and soliciting proposals for the dealing in the same within the State was inoperative as to the particular dealings here in question, because they were interstate commerce, and therefore could not be subjected to the sway of the state statute without causing that statute to be repugnant to the commerce clause of the Constitution of the United States."

Continuing on the same page the Court stated:

> "It is settled by a line of decisions of this court, noted in the margin, that the purpose of the Wilson Act, as a regulation by Congress of interstate commerce, was to allow the State, as to intoxicating liquors, when the subject of such commerce, to exert ampler power than could have been exercised before the enactment of the statute. In other words, that Congress, sedulous to prevent its exclusive right to regulate commerce from interfering with

Contrast With Ruling in Walling v. Michigan and Leisy v. Hardin Decided Prior to Wilson Act.

the power of the States over intoxicating liquors, by the Wilson Act adopted a special rule enabling the States to extend their authority to such liquor shipped from other States before it became commingled with the mass of other property in the State by a sale in the original package."

Referring directly to the Wilson Act, the Court at page 99 said:

"That Act, as we have seen, manifested the conviction of Congress that control by the States over the traffic of dealing in liquor within their borders was of such importance that it was wise to adopt a special regulation of interstate commerce on the subject. When, then, for the carrying out of this purpose the regulation expressly provided that intoxicating liquors coming into a State should be as completely under the control of a State as if the liquor had been manufactured therein, it would become, we think, a disregard of the purposes of Congress to hold that the owner of intoxicating liquors in one State can, by virtue of the commerce clause, go himself or send his agent to such other State, there in defiance of the laws of the State to carry on the business of soliciting proposals for the purchase of intoxicating liquors."

Importance of State Liquor Regulation Recognized.

Defiance of State Liquor Regulation Denounced.

Replying to the contention that the Wilson Act attached only after the liquor came to rest within the State and therefore could not apply to the solicitation for orders of liquor which were still without the State, the Court at page 101 said:

"But, as by the Wilson Act, the power of South Dakota attached to intoxicating liquors, when shipped into that State from another State, after delivery but before the sale in the original packages, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, though such liquors were situated in other States, cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota, a right which by virtue of the Wilson Act did not exist."

Solicitation of Liquor Orders for Importation Contrary to State Regulation; Punishable Under Wilson Act.

1907

PHILLIPS v. CITY OF MOBILE
208 U. S. 472;
28 S. C. 370;
52 L. Ed. 578.

This case did not involve any discrimination against imported liquors, but Phillips contended that the license tax imposed by the ordinance upon sellers of intoxicating liquors was invalid so far as imported liquors were concerned, because the latter could not be taxed in their original packages even under the Wilson Act. The Court replied to this, and said at page 478:

"It is insisted that Congress by the passing of the Wilson Act, merely removed the impediment to the State reaching the interstate liquor through the police power, and that it intended to, and did, keep in existence any other impediment to State interference with interstate commerce in original packages.

"But we are of opinion that this section of the ordinance was clearly an exercise of the police power of the State, and as such authorized by the act of Congress."

And continuing on page 479, it is said:

"The sale of liquors is confessedly a subject of police regulation. Such sale may be absolutely prohibited, or the business may be controlled and regulated by the imposition of license taxes, by which those only who obtain licenses are permitted to engage in it. Taxation is frequently the very best and most practical means of regulating this kind of business. The higher the license, it is sometimes said, the better the regulation, as the effect of a high license is to keep out from the business those who are undesirable and to keep within reasonable limits the number of those who may engage in it."

High License Taxes Sustained As Proper Regulation.

1908. ADAMS EXPRESS CO. v. KENTUCKY
214 U. S. 218;
29 S. C. 633;
53 L. Ed. 972.

This case merely reiterated the ruling that the Wilson Act did not attach to an interstate commerce shipment while the merchandise was in transit and until after its arrival and delivery to the consignee, and therefore the express company could not be prosecuted for delivering liquor from Tennessee to a consignee in Kentucky in violation of a statute of the latter State. No appearance was made in behalf of the State in defense of its statute.

1912.

L. & N. R. R. Co. *v.* F. W. Cook Brewing Co.
223 U. S. 70.
32 S. C. 189;
56 L. Ed. 355.

The Kentucky statute provided that it should be unlawful for any common carrier to transport intoxicating liquor to any consignee in a prohibited local option district. This was merely another example of the ineffectiveness of the Wilson Act to remove the protection of the commerce clause from the prohibited liquor prior to its delivery to the consignee, and the Court held that the railroad company was obligated to transport the liquor into the local option territory regardless of the statute.

1912.

DeBary & Co. v. Louisiana
227 U. S. 108;
33 S. C. 239;
57 L. Ed. 441.

State License on Sale of Imported Liquor Held Valid.

DeBary attacked a state license requirement for engaging "in the business of disposing of alcoholic liquor in less quantities than five gallons." It was conceded that he was engaged only in selling imported liquors in their original packages.

The contention that the Wilson Act referred only to interstate and not foreign commerce was adversely disposed of. Referring to the expression "all liquors" used in the Wilson Act, the court at page 110 said:

> "The word 'all' causes a consideration of the point of origin of the liquors transported to be wholly negligible, and this irresistible conclusion as to the meaning of the text is rendered, if possible, clearer by consideration of the intent of Congress in enacting the Wilson law."

VI.

Congressional History of the Webb-Kenyon Act.

1913. The effect of these decisions, disclosing that the Wilson Act did not completely prohibit importation of liquor contrary to state regulation thereof, and a realization of the opportunities thus afforded unscrupulous persons to evade local liquor regulations, with the resultant growing public conviction that it was an abuse of the interstate commerce privilege to thus allow this means of frustrating the people's wishes, again forced this problem upon the attention of Congress and resulted in the Webb-Kenyon Act.

As reported by the Senate Committee, this legislation (Senate Bill 4043) contained a second section and read as follows:

> "Sec. 1. That the shipment or transportation in any manner or by any means whatsoever of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind, including beer, ale, or wine, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor, is intended, by any person interested therein, directly or indirectly, or in any manner connected with the transaction, to be received, possessed, or kept, or in any manner used, either in the original package or otherwise, in violation of any law of such

State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, enacted in the exercise of the police powers of such State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited.

"Sec. 2. That all fermented distilled, or other intoxicating liquors, or liquids, transported into any State or Territory, or remaining therein, for use, consumption, sale or storage therein, shall, upon arrival within the boundaries of such State or Territory and before delivery to the consignee, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its reserved police powers, to the same extent and in the same manner as if such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise." (Vol. 49, Congressional Record, p. 2687.)

Precisely Same Language as Contained in Wilson Act Against Discrimination.

This section 2 was specifically designed to prevent the State from discriminating against importation of out-of-state liquors, and exactly the same language previously enacted in the Wilson Act was employed in this second section for that purpose.

However, Congress refused to limit the terms of the Webb-Kenyon Act, as it had previously limited the terms of the Wilson Act.

Final Form of Statute Eliminates All Restrictions Against Discrimination.

This bill in final form as passed by the Senate, Vol. 49, Congressional Record, p. 4924, eliminated entirely this section two and all restrictions against discrimination.

THE WEBB-KENYON ACT.

1913. Mar. 1. "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The history of the Webb-Kenyon Act and the Wilson Bill, therefore, offers a striking contrast. The Wilson Bill as originally introduced contained no savings clause or reservation preventing discrimination against imported liquors, but was amended so as to expressly forbid such discrimination and to compel the State to treat imported liquors the same as those products produced within their own borders. On the contrary, the Webb-Kenyon Act began its legislative life with a second section repeating this prohibitive language of the Wilson Act on discrimination, but such section was expressly rejected, and the Webb-Kenyon Act was enacted without any such reservation or prohibition.

Striking Contrast in History of Webb-Kenyon and Wilson Acts as to Discrimination.

The presence of such second section in the original draft and its elimination before final passage, after debate, definitely show the purpose of Congress to leave the States free to discriminate, if they so desire, which is further shown by the arguments which occurred in the United States Senate regarding this section two.

Congressional Comments.

In the remarks by Senator Borah of Idaho, found on page 702, of Vol. 49 of the Congresisonal Record, we find this significant language:

Senator Borah.

"The prohibition which has been made in the preceding section is, in a sense, abrogated in the second, and liquor is recognized as an article of commerce. Recognizing it as an article of commerce, and one which may go into the state, then the question is, can you stop it and turn it over to the state before it is finally delivered to the consignee? In the first section you make it a contraband of commerce when it is being shipped for unlawful use. In the second you recognize it as an article of commerce, but turn it over to the state before it is delivered to the consignee. I do not think this aids the law in its efficiency, and I believe it is unconstitutional."

Senator Kenyon.

Senator Kenyon, one of the co-authors of the bill, in speaking of the effect of section two as contained in the original draft, said on page 830, Vol. 49 of the Congressional Record:

"The first section takes certain liquor out of commerce, and the second section seems to recognize it as being in. There is some incongruity in this."

It is to be noted that the Webb-Kenyon Act was passed in the face of a veto message by President Taft distinctly informing Congress that the effect of the Webb-Kenyon bill, if constitutional, was "to permit the States to exercise their old authority, before they became States, to interfere with commerce between them and their neighbors." (Vol. 49, Congressional Record, p. 4292.)

President Taft's Veto Message.

In the veto message of President Taft, shown on page 4291, Vol. 49 of the Congressional Record, dated February 28, 1913, the President quotes with approval the opinion of George W. Wickersham, Attorney General of the United States upon the subject of the Webb-Kenyon bill.

Attorney-General Wickersham's Opinion.

On page 4296 of this volume, Attorney General Wickersham, in his communication to the President, used this language:

> "The proposition * * * can only be conceded if it be held that Congress can abrogate entirely its power over interstate commerce in an article which it does not itself declare to be 'an outlaw of commerce', but which it leaves to the varying legislation of the respective States to more or less endow with qualities of outlawry. Without prolonging this discussion * * * I am compelled to the conclusion * * * that unless the Supreme Court shall recede from a well settled line of decisions extending over a long period of years, it would most certainly declare this legislation to be without the constitutional powers of Congress."

VII.

Decisions Under Webb-Kenyon Act.

1914. ROSSI v. PENNSYLVANIA
238 U. S. 62;
35 S. C. 677;
59 L. Ed. 1201.

This case, while decided after the passage of the Webb-Kenyon Act, cannot be considered as throwing any light thereon, for the court, at page 66 said:

> "The case arose before the passage of the act of March 1, 1913, known as the Webb-Kenyon Act * * * and the effect of this legislation is therefore not now involved."

1915. ADAMS EXPRESS CO. v. KENTUCKY
238 U. S. 190;
35 S. C. 824;
59 L. Ed. 1267.

The Adams Express Co. was indicted for violation of a statute of the State of Kentucky for delivering intoxicating liquors from Tennessee to certain consignees in Kentucky for their personal use contrary to the said statute.

This statute was before the same Court in the *Louisville & National R. R.* case, 223 U. S. 70, where it was held that the statute was void as an interference with interstate commerce and not within the protection of the Wilson Act because the latter did not attach until after the transportation had been completed by delivery to the consignee. At page 197 the court stated:

> "After the decision of Leisy v. Hardin, Congress passed the Wilson Act in 1890, 26 Stat. 313. That

act made intoxicating liquors transported in interstate commerce subject to the exercise of the police power of the State upon arrival in the State, in the same manner as though such liquors had been produced in the State or Territory into which the same were shipped."

Continuing on page 198 the court further stated:

Purpose of Webb-Kenyon Act to Remove Whatever Protection of Interstate Commerce Over Liquor Importations Remained Under Wilson Act.

"From what we have said, it follows that, before the passage of the Webb-Kenyon Act, while the State in the exercise of its police power might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there was nothing in the Wilson Act which prevents shipment of liquor in interstate commerce for the use of the consignee, provided he did not undertake to sell it in violation of the laws of the State. The history of the Webb-Kenyon Act shows that Congress deemed this situation one requiring further legislation upon its part, and thereupon undertook, in the passage of that act, to deal further with the subject, and to extend the prohibition against the introduction of liquors into the State by means of interstate commerce. That the act did not assume to deal with all interstate commerce shipments of intoxicating liquor into prohibitory territory in the States is shown in its title, which expresses the purpose to divest intoxicating liquors of their interstate character in certain cases. What such cases should be was left to the text of the act to develop."

The Court then proceeds to quote some of the language of the act and concludes therefrom that Congress plainly indicated its purpose not to prohibit all interstate shipments

of liquor into dry territory, but to render the statute operative only when the liquor is to be dealt with in violation of the local law of the State, saying at page 199:

> "Such shipments are prohibited only when such person interested intends that they shall be possessed, sold, or used in violation of any law of the State wherein they are received. Thus far and no further has Congress seen fit to extend the prohibition of the act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state law to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the State to be dealt with therein in violation of local law, the subject matter of such interstate shipments is left untouched and remains within the sole jurisdiction of Congress under the federal constitution."

Apparent Holding That Webb-Kenyon Act Only Applies When Liquor Is to Be Used in Violation of Local Law Is Refuted in Clark Distilling Co. v. Western etc. Ry., 242 U. S. 311.

The Court then goes on to hold, page 202:

> "It therefore follows that, inasmuch as the facts of this case show that the liquor was not to be used in violation of the laws of the State of Kentucky, as said laws are construed by the highest court of that State, the Webb-Kenyon law has no application and no effect to change the general rule that the States may not regulate commerce wholly interstate."

It might seem to be, and this case has been cited in various instances as authority for the proposition that the Webb-Kenyon Act did not prevent the shipment of liquor into a State in violation of its rules and regulations, provided that the State did not make the use thereof unlawful. This, however, is completely refuted in the following case.

1917. JAMES CLARK DISTILLING CO. v. WESTERN MARYLAND RY. CO.
242 U. S. 311;
61 L. Ed. 26;
37 S. C. 180;
L. R. A. 1917B, 1218;
Anno. Cases 1917B, 845.

West Virginia prohibited the manufacture, sale, keeping or storing for sale of intoxicating liquor except by druggists for medicinal, sacramental, scientific, and manufacturing purposes; but there was no express prohibition against the individual right to use intoxicants. The statute further contained a provision that every delivery of liquor in the State by a common carrier should be considered as a consummation of a sale made at the point of delivery in the State. After stating that there can be no doubt that this statute did not offend the due process clause of the Fourteenth Amendment, the Court at page 320 said:

"But that it was a direct burden upon interstate commerce and conflicted with the power of Congress to regulate commerce among the several States, and therefore could not be used to prevent interstate shipments from Maryland into West Virginia, has not been open to question since the decision in Leisy v. Hardin, 135 U. S. 100. And this brings us to consider whether the Webb-Kenyon law has so regulated interstate commerce as to give the State the power to do what it did in enacting the prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States, which is the third proposition for consideration."

Does Webb-Kenyon Act Enable States to Regulate Liquor Traffic and Make Its Regulations Enforceable Against Interstate Shipments?

Replying to the contention that the Webb-Kenyon law "was only intended to include State prohibitions in so far as they forbade the shipment, receipt and possession of liquor for a forbidden use," and where such shipment, receipt, and possession, for individual use was not expressly forbidden, the law did not apply, the Court at page 322 said:

> "This is sought to be supported by the historical environment of the Webb-Kenyon Act as evidenced by the debate on its passage and by a decision of this court as well as decisions of state courts which it is insisted have so construed that act."

But the Court at page 323 stated:

> "The antecedent of the Webb-Kenyon Act, that is, its legislative and judicial progenitors, leave no room for the contention made. To correct the great evil which was asserted to arise from the right to ship liquor into a State through the channels of interstate commerce and there receive and sell the same in the original package in violation of State prohibitions, was indisputably the purpose which led to the enactment of the Wilson Law forbidding the sale of liquor in a State in the original package even although brought in through interstate commerce when the existing or future State laws forbade sales of intoxicants. * * * At the same time it was recognized, however, that as the right to receive liquor was not affected by the Wilson Act, such receipt and the possession following from it and the resulting right to use remained protected by the commerce clause even in a State where what is known as the dispensary system prevailed. Vance v. Vandercook Company, 170 U. S. 438. Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson

Purpose of Wilson Act.

Purpose of Webb-Kenyon Act to Prevent Immunity of Interstate Commerce from Allowing Liquor to Be Shipped Into States Contrary to Their Regulations.

Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears since if that be not true, the coming into being of the act is wholly inexplicable"

Referring then to the *Adams Express Company* case, *supra*, and limiting clearly the extent of that decision, the Court on page 324 said:

Authority of Adams Express Co. v. Kentucky, 238 U. S. 190, Expressly Limited.

"The case in this court relied upon to establish the contrary (Adams Express Company v. Kentucky, 238 U. S. 190) clearly does not do so. All that was decided in that case was that as the court of last resort of Kentucky into which liquor had been shipped had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited."

While the statute might seem to forbid the shipment and receipt of liquor, it will be noted that the state court had expressly held that the statute did not prohibit this, and it was upon the strength of the state court so ruling that this Court held the Webb-Kenyon Act inapplicable. However, in order that the extent of the holding in the *Adams Express Company* case might not be misleading in the slightest degree, and in order that the extent to which the Webb-Kenyon Act removed intoxicating liquors from the protection of interstate commerce might be fully understood, the Court referred to the case of *VanWinkle v. State,* 27 Del. 578. In that case the state law under consideration (Chap. 139, vol. 27) was stated by the state court as follows:

Van Winkle v. State, 27 Del. 578.

"Sec. 1. That it shall be unlawful for any common carrier, knowingly to accept or receive for shipment, transportation or delivery to any person or place within local option territory, or to carry, bring into, transfer to any other person, carrier, or agent, handle, deliver, or distribute in local option territory, any spiritous, vinous, or malt liquor, regardless of the name by which it may be called. * * *

"Sec. 4. This act shall apply to all packages of spiritous, vinous or malt liquor, whether broken or unbroken * * *.

"Sec. 6. That it shall be unlawful for any person to carry, bring, or have brought any quantity of spiritous, vinous, or malt liquor from any point within the State of Delaware into local option territory within said state greater than one gallon within the space of twenty-four hours."

This act, known as the Hazel Law, prohibited commerce in liquor between other States and prohibited districts in this State when the liquor was to be used for any purpose, other than medicinal and sacramental. It was admitted that the liquor was intended by the consignee to be personally used and that he did not intend to sell or otherwise unlawfully dispose of the same. The state court said that such "Hazel Law prohibited the shipment of liquor into a prohibited district * * * whether the liquor be intended to be used in violation of the law or not," and went on to state that the "Webb-Kenyon Act prohibited the shipment of liquor only when the liquor is intended to be used in violation of the law of the State," and that as the Hazel Law was either copied from a similar law in Kentucky or the two laws were taken from a common source, that, therefore, following the ruling in the *Adams Express Company* case, 154 Ky. 462, it would hold that the Webb-Kenyon Act did not apply. But the Supreme Court in the *Clark Distilling Co.* case, referring directly to this *VanWinkle* case, at page 324, went on to state:

"It is true in that case the state law prohibited shipment to and receipt of intoxicants in local option territory, and if the Webb-Kenyon law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was held to be protected as interstate commerce despite the state prohibition because the Webb-Kenyon law was not correctly applied, for the following reason: Coming to consider the text of that law, the court said that as the

Apparent Doctrine of Adams Express Co. v. Kentucky, 238 U. S. 190 as Stated in Van Winkle Case Expressly Repudiated.

Webb-Kenyon Act prohibited the shipment of intoxicants 'only when the liquor is intended to be used in violation of the law of the state', and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a State for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

Interstate Commerce Protection Completely Removed from Liquor Shipments.

1917.

SEABOARD AIRLINE RY. v. NO. CAROLINA
245 U. S. 298;
38 S. C. 96;
62 L. Ed. 299.

An act of North Carolina required railroad companies to keep a separate book in which shall be entered the name of every person to whom intoxicating liquor is shipped, together with certain other data, and that the same shall be open for inspection by any officer or citizen; and the railway company was prosecuted for an alleged violation of such act. The carrier defended itself upon the ground that it could not comply with the state statute without violating the interstate commerce clause. At page 303 the Court said:

"* * * Since our decision in Clark Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311, 320, 324, it has not been open to serious question that the Webb-Kenyon Law is a valid enactment; that 'its

purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor in said commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught'; and that under it a State may inhibit shipments therein of intoxicating liquors from another by a common carrier although intended for the consignee's personal use where such use is not actually forbidden. Plainly, therefore, after that enactment, nothing in the laws or Constitution of the United States restricted North Carolina's power to make shipments of intoxicants to Wake County a penal offense irrespective of any personal right in a consignee there to have and consume liquor of that character.

Webb-Kenyon Act Allows State to Prohibit Shipments Even Though State Permits Use and Traffic in Liquor.

"The challenged act instead of interposing an absolute bar against all such shipments, as it was within the power of the State to do, in effect permitted them upon conditions intended to secure publicity, to the end that public policy might not be set at naught by subterfuge and indirection. The greater power includes the less."

The Court, then expressly referring to the defense of the interstate commerce provisions, says, at page 304:

Congress Abdicates Control of Interstate Shipments of Liquor in Favor of States.

"The provisions of section 15, Act to Regulate Commerce, here relied on were intended to apply to matters within the exclusive control of the Federal Government; and when by a subsequent act Congress rendered interstate shipments of intoxicating liquors subject to state legislation, those provisions necessarily ceased to be paramount in respect of them."

1917. VIII.

Mar. 3. **Reed Amendment.**

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State, Territory, or the District of Columbia, the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be fined not more than $1,000 or imprisoned not more than six months, or both; and for any subsequent offense shall be imprisoned not more than one year."

This was offered by Senator Reed as an amendment to the Postal Service Appropriation Bill. There was practically no debate upon this amendment as adopted in its above form. Senator Reed in offering it stated:

. . . "Ever since the decision of the Supreme Court in the West Virginia cases all doubt has been removed as to the right of the Federal Government to absolutely prohibit the shipment of liquor in interstate commerce. That decision declared that liquor is in a class by itself, subject to rules peculiar to that particular class."

Senator Reed.

Vol. 54 *Cong. Rec.* p. 3331.

As originally offered, this amendment contained an additional provision prescribing a penalty for the person within the State who used such liquor. But this was rejected upon the strength of Senator Borah's objection that it would be unconstitutional as an invasion of the State's exclusive jurisdiction over purely local matters.

Rejected Provision.

The meaning and intent of the Reed Amendment is so clear and unambiguous that it has not been open to question. This was merely a prohibition by Congress of interstate shipments in certain instances, aside from State regulation thereon, and regardless of whether or not the States had restricted or prohibited such shipments.

1918. UNITED STATES v. DAN HILL
248 U. S. 420;
39 S. C. 143;
63 L. Ed. 337.

The laws of West Virginia forbade the manufacture and sale of intoxicating liquors, but did not forbid their personal use. Hill purchased a quart of liquor in Kentucky for his personal use and boarded a trolley car with the whiskey upon his person and carried the same into West Virginia. He was prosecuted for violation of the Reed amendment. Referring to the three acts governing interstate transportation of liquor, the Court, at page 424, said:

Comparison of Wilson, Webb-Kenyon, and Reed Acts.

"Congress in the passage of the Reed amendment, must be presumed to have had, and in our opinion undoubtedly did have, in mind this well known and often declared meaning of interstate commerce. It had already provided in the Wilson Act for state control over liquor after its delivery to the consignee in interstate commerce. In the Webb-Kenyon Act it had prohibited the shipment of liquor in interstate commerce where the same was to be used in violation of the law of the State into which it was transported. In the passage

of the Reed Amendment it was intended to take another step in legislation under the authority of the commerce clause. * * * The order, purchase, or transportation in interstate commerce, save for certain excepted purposes, is forbidden."

And on page 427, it continues:

"In view of the authority of Congress over the subject matter, and the enactment of previous legislation embodied in the Wilson and Webb-Kenyon laws, we have no question that Congress enacted this statute because of its belief that in States prohibiting the sale and manufacture of intoxicating liquors for beverage purposes the facilities of interstate commerce should be denied to the introduction of intoxicants by means of interstate commerce, except for the limited purposes permitted in the statute which have nothing to do with liquor when used as a beverage. That the State saw fit to permit the introduction of liquor for personal use in limited quantities in no wise interferes with the authority of Congress, acting under its plenary power over interstate commerce, to make prohibition against interstate shipments contained in this act. It may exert its authority, as in the Wilson and Webb-Kenyon Acts, having in view the laws of the State, but it has a power of its own, which in this instance it has exerted in accordance with its view of public policy."

Congress thus by the Reed Amendment, was held to be exercising its own prerogative to regulate the transportation of intoxicating liquors in interstate commerce, in addition to the laws of the States permitting the importation and use thereof.

IX.

1920. **Eighteenth Amendment.**

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

1922. RAINIER BREWING COMPANY v. GREAT NORTHERN PACIFIC S. S. Co.
259 U. S. 150;
42 S. C. 436;
66 L. Ed. 868.

This case, while decided after the Eighteenth Amendment, arose in 1917 and was based upon the Wilson and Webb-Kenyon Acts.

State Permitted Use of Liquor But Provided Certain Restrictions Upon Importation.

The brewing company shipped two carloads of beer from California consigned to a transfer company at Seattle, Washington, containing 2,565 separate packages addressed to separate individuals. When the shipment reached Portland, the Northern Pacific Co. refused to accept the same upon the ground that it could not lawfully carry such intoxicating liquors in carload lots into the State of Washington.

The Washington law limited the amount of liquor which any person could bring into the State at one time to not more than twelve quarts of beer or one-half gallon of

other liquor, and this could only be imported under a permit issued by a County Auditor, limiting one such permit to one person in any statutory period. It also further required that the permit should be conspicuously affixed to each package, required the same to be plainly marked "Intoxicating liquors", and forbade any carrier to transport the same except in compliance with such requirements. The personal use and possession of such liquor was, of course, permitted under the state law. At page 152 the Court said:

> "The Webb-Kenyon Act prohibited 'the shipment or transportation in any manner or by any means whatsoever' of any intoxicating liquor of any kind from one state to another state to be received or in any manner used in violation of any law of any such latter state. With these laws in force at the time, the railroad company could carry the beer into Washington only when labeled as required by section 240, *supra*, and in the manner allowed by the laws of the state, which we shall briefly consider."

After referring to the terms of the Act, the Court at page 154 said:

Washington Restrictions Upon Importing Liquor More Stringent and Burdensome Than California A.B.C. Act.

> "This statement of the applicable law shows that the purpose of the legislation was to make the transportation of intoxicating liquors into the State of Washington as difficult, conspicuous and expensive as possible. Only an individual could qualify to ship or receive it, and it was intended that it should move only in a single package of strictly limited quantity with a permit attached, showing its origin, destination, and the name of the shipper, who must also be the ultimate consignee. * * *

"The marking of the packages, required by both the federal and the state law, advised the railroad company of the character of their contents and as to the real consignee and that they resided in Seattle and we think, therefore, that it was clearly its duty to refuse to carry the beer in carload bulk shipment for delivery to the transfer company, * * *."

This case clearly demonstrates that the Webb-Kenyon Act does remove the protection of the commerce clause from the transportation of liquor into a state contrary to its rules and regulations, even though the use and possession of such liquor is not prohibited and is lawful.

1932. McCormick & Co. v. Brown
286 U. S. 131;
52 S. C. 522;
76 L. Ed. 1017.

The constitution of West Virginia prohibited the manufacture, sale, and keeping for sale of malt, vinous, or spiritous liquors, wine, porter, ale, beer or any intoxicating drink, mixture or preparation of like nature, except "such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes."

This action "was brought by non-resident manufacturers and wholesale dealers to restrain state officers of West Virginia from requiring the complainants to obtain permits from the State Commissioner of Prohibition, and to pay an annual license fee of $50.00, before shipping certain products into the state to purchasers there for resale. It was not intended that such liquor was to be shipped into the State to be used in violation of any of its laws, and it was contended that it was unlawful on the part of the State to require any license fee

or to place any other regulation or restriction upon the importation thereof.

Mr. Chief Justice Hughes in delivering the opinion of the Court, at page 140, said:

> "Prior to the adoption of the Eighteenth Amendment, the Congress, exerting its constitutional powers of regulation, had prohibited the movement in interstate commerce into any state of intoxicating liquors for purposes prohibited by the state law. (Citing the Webb-Kenyon Act, the Wilson Act, and the Reed amendment.) With direct application to the prohibition law of West Virginia (the predecessor of the present statute and having a similar definition of 'liquors,' West Virginia Laws 1913, Chap. 13), this Court held that the purpose of the Webb-Kenyon Act 'was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through said commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught.' * * * The appellants do not urge, and there would be no grounds, for such a contention, that either the Eighteenth Amendment or the National Prohibition Act had the effect of repealing the Webb-Kenyon Act. The Congress has not expressly repealed that act, and there is no basis for an implication of repeal. * * *"

Continuing at page 142 the Court said:

> "The Congress undoubtedly recognized, as this court had decided, that the state could prohibit the sale of liquor absolutely or conditionally. It could prohibit sale as a beverage and permit sale for medicinal and like purposes. It could prohibit sale by merchants and permit it by licensed druggists." (Citing cases.)

The Court in this case finally and decisively disposes of the contention that the Webb-Kenyon Act applies only where there is an attempt to violate the laws of the state into which the shipment is to be made, saying at page 143:

> "The appellants make the further point that the Webb-Kenyon Act applies only where there is an intent to violate the laws of the state into which the shipment is made. The Act prohibits the shipment or transportation of intoxicating liquor into a state when it 'is intended, by any person interested therein, to be received, possessed, or in any manner used * * * in violation of any law of such state.' The argument is that no intent to violate the laws of West Virginia can be imputed to the appellants. It is said that they ship their products only to licensed dealers in West Virginia, that is, to those who are authorized by the State Commissioner of Prohibition 'to receive, store, and sell the same.' The short answer is that the state law does not make the permits issued to local dealers a substitute for the permits required of wholesale dealers. If the provisions of the state law, and the regulations under it, which expressly require state permits for sales by wholesale dealers of the products in question, are valid, it necessarily follows that sales by appellants of these products without such permits would be a violation of the state law within the meaning of the Webb-Kenyon Act. The appellants in making the sales are obviously interested persons, and the shipment of their products into the state for the purpose of consummating their sales without the described permits would fall directly within the terms of that Act."

X.

1932. TWENTY-FIRST AMENDMENT.

Original Form.

The proposal to repeal the Eighteenth Amendment, terminating in the adoption of the Twenty-first Amendment to the Constitution, as proposed in Senate Joint Resolution 211 in December, 1932, contained a specific proposal to remove the protection of the interstate commerce clause from intoxicating liquors *only* when the same moved into the prohibition or so-called bone dry states, and read as follows:

Protection of Commerce Clause Specifically Removed from Liquor Only in Prohibition States.

"Section 1. The provisions of clause 3 of Section 8 of Article I of the Constitution . . . shall not be construed to confer upon the Congress the power to authorize the transportation or importation into any state . . . . for use therein of intoxicating liquors for beverage or other purposes within the state or territory if the laws in force therein prohibit such transportation or importation; . . . ." (Vol. 76, Congressional Records, p. 65.)

Judiciary Committee Changes to Present Form.

On January 9, 1933, the Senate Judiciary Committee presented its report on this Resolution, recommending as a complete substitution therefor the Amendment in its present form, with the addition of an added section, which latter was subsequently removed. (Vol. 76, Congressional Records, p. 1621.)

Congressional Debate: Senator Blaine.

Senator Blaine of Wisconsin, representing the Judiciary Committee, in discussing the recommendation of such Committee, said:

Comment on Wilson Act.

"First, however, we had what is known as the Wilson Law. That law was treated in the case of Rhodes v. Iowa, 170 U. S. 412; but the Supreme Court in that case gave rather a restricted construction of the language used by Congress, and held that under the Wilson Act the interstate character attached to the liquor until it had actually been delivered to the consignee. . . .

Comment on Webb-Kenyon Act.

. . . The Webb-Kenyon Act was interpreted by the Supreme Court of the United States in the case of Clark Distilling Company v. Western Maryland Railway, 242 U. S. 311. The language of the Webb-Kenyon Act was designed to give the states in effect power of regulation over intoxicating liquor from the time it actually entered the confines of the state; and the Supreme Court held that it was following the doctrine laid down in the case of Rhodes v. Iowa, and necessarily must follow that doctrine in order to sustain the decision it was making in the case of Clark against Maryland Railroad Company. . . .

In the case of Clark against Maryland Railway Company there was a divided opinion. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry states against the importation of intoxicating

liquor into those states, it is proposed to write permanently into the Constitution a prohibition along that line." (Vol. 76, Congressional Records, pp. 4140, 4141.)

And referring again to the second paragraph of the present amendment he said (page 4143):

Purpose of Sec. 2 Stated.

"* * * The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States * * *"

Senator Borah.

Senator Borah, a recognized authority on constitutional law, speaking on this proposed amendment before the Senate, said:

Restoration of State Rights in Liquor Control.

"Mr. President, I wanted to say that this question of the right of the States, in the exercise of the police powers to control the liquor traffic within the States, was fairly and squarely presented in many cases to the Supreme Court, always a portion of the court contending that the police power should be permitted to be exercised by the States to the full extent within the boundaries of the States. * * * The people had declared they wanted to be rid of this evil, or at least to control it their own way. These States were invaded, their laws broken, their officials corrupted, by the same influences which now plead for State's rights and local control. They did not at that time respect that right at all. They trampled upon it and scoffed at it. Therefore, if we are to have what we are now promised, local self government, State rights, the right of the people of the respective States to adopt and enjoy their own policies, we must have

some other method, some other provision of the Constitution, than those which existed prior to the adoption of the Eighteenth Amendment.

All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently in the Constitution of the United States." (Vol. 76, Congressional Record, page 4172.)

In order that there might be no question but that the protection to be afforded by Congress in the removal of the interstate commerce provision should be extended only to the so-called "bone dry" States, Senator Glass of Virginia offered as an amendment a substitute containing the following language, which amendment was eventually rejected (Vol. 76, Congressional Record, page 4211):

Senator Glass' Substitute.

"The sale of intoxicating liquors within the United States * * * for consumption at the place of sale, and the transportation of intoxicating liquors into any State * * * in which the manufacture, sale, and transportation of intoxicating liquors are prohibited by law, are hereby prohibited * * *."

In explaining this amendment, the Senator said (p. 4219):

Applies Only to Prohibition States.

"* * * In my own interpretation of the resolution as I have presented it, there can be no consignee of intoxicating liquors in a dry State. Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but the resolution as I have drafted it prohibits the shipment of intoxi-

cating liquors into a State whose laws prohibit the manufacture, sale or transportation of liquors. So I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors; * * *"

Congress Chooses Between Application of Amendment to All States or Only to Bone-Dry States.

From this it will be seen that Congress had squarely before it the question of whether or not the proposed constitutional amendment should remove the protection of interstate commerce from the shipment of liquors into all States contrary to their laws, or simply into States which are bone dry. That there was no question in the mind of Congress as to the meaning of the provision is shown by the language of Senator Robinson of Arkansas who said, at page 4225:

Senator Robinson.

"The language of section 2 is perfectly plain. (Quoting same.) That leaves to the State the power of regulation; it places the moral force of the government of the United States behind the State in the enforcement of their laws; * * *"

In the House, Mr. McSwain said (page 4522):

Representative McSwain.

"The proposed amendment to the Constitution is, in effect, a proposal to repeal the Eighteenth Amendment, but also to give a constitutional guarantee that the transportation or importation into any State of intoxicating liquors, in violation of the laws of such State, shall be prohibited forever."

1933.
Dec. 5.

The Twenty-first Amendment to the United States Constitution as finally proposed by Congress to the States on February 20, 1933, and as ratified by the requisite number of States and in force December 5th, 1933, was in the exact language as reported out by the Senate Judiciary Committee as follows:

Final Form.

"Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

Decisions Under the Twenty-First Amendment.

So far as we are at present aware, all of the decisions construing the Twenty-first Amendment to the United States Constitution have been confined to judgments of the District Courts of the United States.

Premier Pabst Sales Co. v. McNutt.

1935.
Jan. 4.

D. C. (Indiana) Jan. 4, 1935.

The above action, in which no opinion has appeared in any report to our knowledge, was begun to enjoin the enforcement of the Alcoholic Beverage

Control Act of Indiana. By the provisions of the Indiana Act the State was divided into ten districts, and one party in each district was appointed as the official importer and no other importers were allowed. Each importer was required to pay an annual license fee of $2,500, and while the domestic manufacturer of beer was required to pay the same license fee, the latter had the whole State for his market, while the importer could only dispose of his imported beer in the particular district in which he was located. Under this arrangement, the foreign brewer who wished to compete with the local manufacturer had to provide an outlet in each of the ten districts, which, at the fee of $2,500 each, aggregated $25,000, in order to cover the State to the same extent and to compete with the local brewer. There could be no question but that the statute strongly discriminated against imported beer and in favor of local beer.

The District Court dismissed the attack upon the constitutionality of the statute made upon the grounds that it was in violation of the Fourteenth Amendment and the equal rights clause, holding that these did not apply to the regulation of liquor. It then referred to various decisions of this Court construing the Webb-Kenyon Act and said:

> "A State may prohibit the liquor traffic within its borders altogether, thereby prohibiting the shipment of intoxicating liquor into the State altogether. This is not in violation of the commerce clause of the Federal Constitution. Therefore the power of absolute prohibition gives the State the lesser power of prescribing by law the condition under which such shipment may be allowed."

Fry v. Rosen, 198 N. E. 375.

The District Court also called attention to the decision of the State Court of Indiana in *Fry v. Rosen,* 198 N. E. 375, involving the same liquor act, in which that Court had said:

> ". . . A vendor of alcoholic malt beverages who does business outside of Indiana has no right or privilege to transport such beverages into Indiana by reason of any protection afforded by the interstate commerce clause of the Federal Constitution."

Appeal to U. S. Supreme Court Dismissed.

In this last case an appeal was prosecuted by Rosen to the United States Supreme Court, which dismissed the same upon the ground that the jurisdictional statement failed to disclose any properly presented substantial Federal question (*Rosen v. Fry,* 296 U. S. 526, 55 S. C. 143, 79 L. Ed. 636). Paragraph 4 of the jurisdictional statement referred to said that it was the contention of appellants that the sections of the act in question were repugnant to the commerce clause and to the Fourteenth Amendment to the Federal Constitution.

1935. June 29.

TRINER CORPORATION v. ARUNDEL (Minn.), 11 Fed. Supp. 145.

A Minnesota statute enacted in 1935 provided that "no licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors * * * unless such brand or brands shall be duly registered in the Patent Office of the United States." The brand of the Triner Corporation was not so registered, and the State officials served notice upon such corporation that it could no

longer import any of such of its brands into Minnesota. Referring to the Twenty-first Amendment, the court, at page 146, said:

> "With the contention that by this language it was intended that intoxicating liquors should be excepted from the provisions of the Commerce Clause and other provisions of the Constitution of the United States, we are unable to agree. The purpose of the provision referred to was to make it impossible for Congress to permit the transportation or importation into any State, Territory, or possession of the United States of intoxicating liquors in violation of the laws of the State, Territory, or possession. In other words, the provision left the State, Territory, and possession free to determine to what extent, if at all, intoxicating liquors should be a lawful subject of commerce within their limits."

Leaves State Free to Determine to What Extent Liquor Shall Be Subject of Commerce.

The case was not decided on the commerce clause. The Minnesota Act did not require brands of liquor manufactured within the State to be registered and the court considered this a discrimination and stated (p. 147):

> "* * * We think it is only necessary to consider one question, and that is whether Chapter 390 denies to the plaintiff the equal protection of the law."

Case Turned Upon Equal Protection and Not Upon Commerce Clause.

The Court then reached only one conclusion and that was that this statute did deny "to the plaintiff the equal protection of the law, and is therefore unconstitutional."

The next decision in point of time was the one from which this present appeal is being prosecuted.

1935.
Dec. 10.

PREMIER-PABST SALES CORPORATION v. GROSSCUP
(Penn.), 12 Fed. Supp. 970.

The precise point here in question was passed upon directly by the District Court of Pennsylvania in the above case.

The Pennsylvania statute discriminated between distributors of beer made within the State and distributors of imported beer. The annual license fee for the former being four hundred dollars and for the latter nine hundred dollars.

Same Constitutional Provisions Urged as in Present Appeal.

The District Court considered squarely whether or not this discrimination was a violation of the Federal Commerce Clause, of the Fourteenth Amendment, and of Section 2 of Article IV of the Federal Constitution, the same three provisions which the plaintiff in the present action urged were being violated by the California law. The District Court of Pennsylvania, after considering the Wilson Act, the Webb-Kenyon Act, and the Reed Amendment and finally the Twenty-first Amendment, said at page 972:

Statement of Extent of 21st Amendment.

"Under the Twenty-first Amendment when a State passes a law upon the subject of the importation of intoxicating liquors all importation in violation of that law is forbidden by the Constitution and laws of the United States. . . . It further follows that the commerce clause availed the plaintiff nothing."

The Court then referred to the *Triner Corp.* case, the *Young's Market Co.* case here in question, and a Georgia case for which we have found no reported opinion, and after considering the same, said at page 973:

Triner Case and Present Case Reviewed.

> "It is here that we find ourselves in disagreement with what we are asked to find in the opinion of the cited case. It is that any State law that interferes with the importation of intoxicating liquor into the State is in conflict with the commerce clause of the Constitution and hence a nullity.
>
> "We adhere to the view, before expressed, that if it cannot be imported without a violation of the law of the State, its importation is declared unlawful by the Webb-Kenyon Act and by the Twenty-first Amendment, and it is hence without the operation of the Commerce Clause."

This *Grosscup* case was carried to the Supreme Court where it was affirmed May 18, 1936, 56 S. Ct. 754, but this Court declined to pass upon the Constitutional question and based its affirmance upon the fact "that the plaintiff is without standing to present it."

1936.

GENERAL SALES & LIQUOR CO. v. BECKER (Mo.), 14 Fed. Supp. 348.

Feb. 10.

The Missouri Liquor Control Act required a non-resident wholesaler to pay the same annual license fee as a resident wholesaler, but prohibited such non-resident from selling directly to retail dealers and required him to sell only to or through other wholesalers. It was contended that this violated both the commerce clause and equal protection of the Fourteenth Amendment. That Court, after discussing the various

acts of Congress limiting interstate commerce in regard to liquor, said at page 350:

"The adoption of the Twenty-first Amendment has without doubt limited and qualified the commerce clause to the extent that State laws, regulating the importation of liquor into a State, placed no prohibited burden upon commerce. This conclusion is in complete accord with that of the District Court in Joseph Triner Corp. v. Arundel, 11 Fed. Supp. 145, where it was determined that the purpose of the Amendment was not to except intoxicating liquors from the provisions of the Commerce Clause. The Amendment does recognize the authority of the State to regulate the movement of liqour into the State, and where availed of; as in this case, the importation of intoxicating liquors in violation of local law is outside the Commerce Clause.

". . . This gives this plaintiff no cause of complaint that a burden has been placed upon interstate commerce, because the State having acted, the liquor imported has to that extent lost its character as an article in interstate commerce. There is no basis for the contention made by plaintiff that the statute must fall because it places a restriction upon commerce between the States."

State Laws Regulating Importation of Liquor No Longer Come Within Restrictions of Commerce Clause.

In its discussion of the Fourteenth Amendment, the Court recognized that "it would be an impossible task for the State to inspect premises and products, and enforce regulation beyond its borders", and it was recognized that a distinction between home brewed liquor and imported liquor was wholly justifiable and was not discriminatory nor violative of any Constitutional provision.

Distinction Between Local and Imported Liquor Justifiable.

1936.
Feb. 28.

PACIFIC FRUIT & PRODUCE CO. v. MARTIN
(Wash.)

We do not find the above case which was decided Feb. 28, 1936, in the District Court for the Western District of Washington, Southern Division, reported as yet. That Court follows the present case of the Young's Market Co. on which it relies to a large extent, and expressly disagrees with the Grosscup decision. Its conclusion may be summed up in the following paragraph:

Young's Market Case Followed.

Grosscup Case Repudiated.

> "While it may be conceded that the intent of the Wilson Act, etc., and the Twenty-first Amendment was to take from intoxicating liquor the protection of the Interstate Commerce Clause in so far as necessary to deny them an advantage over the intoxicating liquors produced in these States into which they were brought, yet, none of them show an intent or purpose to so abdicate control over interstate commerce as to permit discrimination against intoxicating liquors brought into one State from another."

1936.

PHILIP BLUM & CO. v. HENRY
(Wis. 3-28-36).

Mar. 28.

The above case does not appear to have been reported. It was decided March 28, 1936, by the District Court for the Eastern District of Wisconsin.

Like the Missouri statute heretofore referred to, the Wisconsin Act required non-residents to pay an annual fee of $500 in order to sell liquor in that State, and $10 for

each salesman so employed. This fee permitted the holder of the license to sell only to manufacturers or wholesalers, whereas the same fee paid by residents allowed them to sell to manufacturers and wholesalers and retailers as well.

> "The complaint therefore seems to be that the fee has been increased from $1.00 to $500.00, and that in spite of such increased fee, non-residents are prohibited from selling to retailers, whereas Wisconsin wholesalers may do so."
>
> "At the threshhold of the application it is necessary to consider the interpretation and scope of the 21st Amendment * * * * * * * It deals solely with the subject of transportation or importation into any State."

The Court, after discussing the intent of the 21st Amendment, as denoted by the language thereof, says:

> "The query is at once prompted, Can it be possible that the language of the Amendment may be so ignored that Congress may still regulate interstate commerce — in intoxicating liquor,—by authorizing transportation into any State, notwithstanding interdiction by the State? Or that it must be held, notwithstanding the Amendment, that the right to transport intoxicating liquors into any State is guaranteed by other articles of the National Constitution as a 'privilege or immunity' of a citizen of the United States; or to 'citizens of the several States'; or as a guaranteed protection of equal laws? We regard these contentions as repugnant to the plain words of the articles."

Plain Words of Amendment Held to Remove Protection of Other Provisions of Constitution From Importation of Liquor.

Speaking of the distinction between "importers" and local dealers, the court said:

Distinction in Classification Between Importers and Local Dealers Recognized.

"* * * In order to deal properly with those who traffic both from without and within the State, a classification between those two groups of traffickers, cannot *prima facie* be called arbitrary or unreasonable, or as not germane to the ultimate objective."

In view of this long congressional history, from which the Twenty-first Amendment was evolved, and the decisions of the lower Federal courts construing it and the decisions of this Court applying the Webb-Kenyon Act, its congressional prototype, the purpose of the American people is clearly and emphatically registered by this Amendment to restore to the States their full sovereignty and authority to control liquor. This gives the States the power to prohibit, limit or regulate importations thereof and to do so without regard to discrimination as between such imports and domestic liquor.

FILE COPY

FILED
OCT 12 1936
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1936

No. 22

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *et al.*,

Appellants,

vs.

YOUNG'S MARKET COMPANY, *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEES

FREDERICK H. WOOD,
Of Counsel.

M. J. DONNELLY,
C. J. LYNCH, JR.,
WILLIAM M. DALLAS,
JOHN E. O'HORA,
Counsel for Appellees.

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
THE STATUTE	2
THE TWENTY-FIRST AMENDMENT	6
STATEMENT OF CASE	6
SUMMARY OF ARGUMENT	12
ARGUMENT:	
POINT I—The tax is one imposed solely upon the privilege of engaging in interstate commerce, the effect of which is to discriminate in favor of domestic beer and its wholesalers and against beer received from without the state and its wholesalers	14
POINT II—The effect of the Twenty-first Amendment was not to free all liquor legislation of the states, whether wet or dry, from all constitutional limitations arising under the commerce clause in the exercise of the police power of the states	17
1. The Twenty-first Amendment is not a grant of power to the states but a limitation upon the restrictions upon the exercise of the state's police power contained in other provisions of the Federal Constitution. The question is the extent to which the application of such restrictions has been removed	17

PAGE

2. The inevitable consequences of appellants' contention that the effect of the Twenty-first Amendment was to free all liquor legislation of the states from all constitutional limitations arising from any other provision of the Constitution or from the Commerce Clause alone are such as to repel its acceptance in the absence of completely convincing evidence that such was its purpose 21

3. The historical background of the Amendment lends no support to the contention made but on the contrary requires its rejection 26

a. The applicable rules of constitutional interpretation 26

b. The relation between the Twenty-first Amendment and the Webb-Kenyon Act 27

c. The effect of the Commerce Clause prior to the Wilson Act in preventing the states from subjecting interstate commerce in liquor to non-discriminatory regulation 30

d. The Wilson Act 32
(1) The adoption of the Wilson Act 32
(2) The constitutionality of the Wilson Act 33

e. The Webb-Kenyon Act 34
(1) The circumstances leading to the adoption of the Webb-Kenyon Act 34
(2) The adoption of the Webb-Kenyon Act. 39
(3) The effect of the Webb-Kenyon Act in extending the police power of the states to aspects of interstate commerce in liquor which had theretofore been immune from any exercise of that power. 43

f. Appellants' argument based upon history of the adoption of the Twenty-first Amendment 52

PAGE

POINT III—The Twenty-first Amendment does not remove state liquor legislation from the operation of the established principle that matters which are admittedly within the sphere of state power may nevertheless not be so regulated as to discriminate against the products of other states and their manufacturers and dealers, and the Act is therefore invalid 57

1. The states may not under the Webb-Kenyon Act and the Twenty-first Amendment exercise their police power so as to discriminate against the products of other states..... 58

a. Decisions of this Court involving state liquor legislation 58

b. Decisions of lower federal courts..... 65

c. Applicability of decisions of this Court forbidding discrimination against foreign products other than liquor..... 65

d. Conclusion as to the power of states to discriminate against products of other states... 70

2. The discriminatory effect of the California tax is not cured by the tax upon domestic manufacturers 75

POINT IV—The Act is invalid because it denies to appellees the equal protection of the laws..... 87

POINT V—Finding XV of the Court below is fully supported by the record..... 95

CONCLUSION 96

PAGE

APPENDICES:

Appendix A—California Alcoholic Beverage Control Act i

Appendix B—

I. Form of Webb-Kenyon Act as originally proposed xliv

II. Debates stressing object of bill as an aid to states in exercise of police power xliv

III. Debate relating to constitutionality of second section and reasons for its elimination xlvii

IV. Debate evidencing divergence of views in respect to constitutionality of bill xlix

Appendix C—President Taft's veto message lii

Appendix D—Debates on proposed Twenty-first Amendment lix

Appendix E—Retaliatory bills and laws lxvi

Appendix F—Analysis of district court opinions rendered by three-judge courts since adoption of Twenty-first Amendment lxx

Appendix G—Extract from article by D. O. McGovney lxxviii

TABLE OF CASES CITED

PAGE

Adams Express Co. v. *Kentucky*, 214 U. S. 218.....36, 37
Adams Express Co. v. *Kentucky*, 238 U. S. 190.....44, 50
American Express Co. v. *Iowa*, 196 U. S. 133...18, 36, 37
American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89 90
Armour & Co. v. *Virginia*, 246 U. S. 1..... 23
Asher v. *Texas*, 128 U. S. 129..... 15

Baldwin v. *Seelig*, 294 U. S. 511.....22, 66, 67, 68, 71
Bethlehem Motors Corp. v. *Flynt*, 256 U. S. 421....23, 70
Bowman v. *Chicago & N. W. Ry. Co.*, 125 U. S. 465, 18, 31
Brennan v. *City of Titusville*, 153 U. S. 289..... 15
Brennen v. *Southern Express Co.*, 106 So. Car. 102, 90 S. E. 402..... 46
Brimmer & Rebman, 138 U. S. 78.....23, 45, 70
Brown-Forman Co. v. *Kentucky*, 217 U. S. 563.....38, 80
Brown v. *Maryland*, 12 Wheat. 419.....15, 95

Caldwell v. *North Carolina*, 187 U. S. 622..... 15
Clark Distilling Co. v. *Western Maryland Ry. Co.*, 242 U. S. 311 .....43, 44, 49, 50, 59
Colgate v. *Harvey*, 296 U. S. 404.....87, 92
Cook v. *Pennsylvania*, 97 U. S. 566..... 23
Corson v. *Maryland*, 120 U. S. 502..... 15
Cox v. *Texas*, 202 U. S. 446.....88, 89, 90, 91
Crenshaw v. *Arkansas*, 227 U. S. 389..... 15

Darnell & Son v. *Memphis*, 208 U. S. 113.....23, 66
Davis v. *Virginia*, 236 U. S. 697..... 15
De Bary v. *Louisiana*, 227 U. S. 108..... 35
Delamater v. *South Dakota*, 205 U. S. 93..... 36
Dozier v. *Alabama*, 218 U. S. 124..... 15

PAGE

Evans v. *Gore*, 253 U. S. 245 26
Evansville Brewing Ass'n v. *Excise Commission*, 225 Fed. 204 48

Foote & Co. v. *Stanley*, 232 U. S. 494 70
Foppiano v. *Speed*, 199 U. S. 501 35
Foster v. *Master & Wardens of The Port of New Orleans*, 94 U. S. 246 69
Foster Packing Co. v. *Haydel*, 278 U. S. 1 22

General Sales & Liquor Co. v. *Becker*, 14 Fed. Supp. 348 65
Guy v. *Maryland*, 100 U. S. 434 .....66, 67, 72

Hannibal & St. Jos. Ry. Co. v. *Husen*, 95 U. S. 465 ..22, 70
Heyman v. *Southern Ry. Co.*, 203 U. S. 270 .....18, 36

Kirmeyer v. *Kansas*, 236 U. S. 568 36

Leisy v. *Hardin*, 135 U. S. 100 .....18, 31, 32, 62
Lloyd v. *Dollison*, 194 U. S. 445 88
Louisville & Nashville Ry. v. *Cook Brewing Co.*, 223 U. S. 70 .....18, 36, 37

McCormick & Co. v. *Brown*, 286 U. S. 131 50
Maxwell v. *Dow*, 176 U. S. 581 .....27, 55
Minnesota v. *Barber*, 136 U. S. 313 .....22, 23, 45, 70
Mountain Timber Co. v. *Washington*, 243 U. S. 219 16
Mugler v. *Kansas*, 123 U. S. 623 .....30, 88, 93

Norfolk & W. R. Co. v. *Sims*, 191 U. S. 441 15

Pabst Brewing Co. v. *Crenshaw*, 198 U. S. 17 35
Pacific Fruit & Produce Co. v. *Martin*, not reported... 65
Pennsylvania v. *West Virginia*, 262 U. S. 553 22
Phillips v. *Mobile*, 208 U. S. 472 35
Premier-Pabst Sales Co. v. *Grosscup*, 12 Fed. Supp. 970 .....65, 81
Prout v. *Starr*, 188 U. S. 537 .....25, 71

Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389.. 92

PAGE

In re Rahrer, 140 U. S. 545 ..... 19, 33, 35

Rainier Brewing Co. v. *Great Northern P. S. S. Co.,* 259 U. S. 150 51
Real Silk Hosiery Mills v. *Portland,* 268 U. S. 325 .. 15, 62
Rearick v. *Pennsylvania,* 203 U. S. 507 15
Reymann Brewing Co. v. *Brister,* 179 U. S. 445 .. 38, 81, 90
Rhodes v. *Iowa,* 170 U. S. 412 ..... 18, 35, 36, 39, 42
Robbins v. *Taxing District of Shelby County,* 120 U. S. 489 ..... 15, 62
Rossi v. *Pennsylvania,* 238 U. S. 62 37
Royster Guano Co. v. *Virginia,* 253 U. S. 412 87

Scott v. *Donald,* 165 U. S. 58, 20, 23, 37, 38, 39, 45, 46, 58, 71
Seaboard Air Line Railway v. *North Carolina,* 245 U. S. 298 ..... 51, 61, 83
Smith v. *St. Louis, etc. Ry. Co.,* 181 U. S. 248 69
Sonneborn Bros. v. *Cureton,* 262 U. S. 506 62
Standard Oil v. *Graves,* 249 U. S. 389 70
State v. *North,* 27 Mo. 464 74
Stewart v. *Michigan,* 232 U. S. 665 15
Stockard v. *Morgan,* 185 U. S. 27 15
Texas Co. v. *Brown,* 258 U. S. 466 70
Tiernan v. *Rinker,* 102 U. S. 123 ..... 23, 63, 64
Triner Co. v. *Arundel,* 11 Fed. Supp. 145 65
Turner v. *Maryland,* 107 U. S. 38 ..... 61, 69, 84

Vance v. *Vandercook Co.,* 170 U. S. 438, 23, 35, 38, 70, 71
Voight v. *Wright,* 141 U. S. 62 ..... 23, 70

Walling v. *Michigan,* 116 U. S. 446, 22, 45, 61, 62, 63, 66, 67, 74, 79
Webber v. *Virginia,* 103 U. S. 344 ..... 23, 66, 67
Welton v. *Missouri,* 91 U. S. 275 23
West v. *Kansas Natural Gas Co.,* 221 U. S. 229 22
Western Oil Refining Co. v. *Lipscomb,* 244 U. S. 346 . 15

PAGE

TABLE OF STATUTES CITED

Webb-Kenyon Act 29
Wilson Act 32
Judicial Code 1

AUTHORITIES CITED

Twenty-first Amendment 6
Congressional Record 28, 39, 41, 42, 53
Story, Commentaries 25
Willoughby, Const. Law, 2nd Ed., 1929 25

Supreme Court of the United States

OCTOBER TERM, 1936

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *et al.*, *Appellants*,

vs.

YOUNG'S MARKET COMPANY, *et al.*

No. 22

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the District Court for the Southern District of California (R. 33) is reported in 12 Fed. Supp. 140.

Jurisdiction

The final decree of the Court below (R. 64) was entered October 9, 1935 (R. 71). An appeal to this Court was allowed January 7, 1936 (R. 71-72). The jurisdiction of this Court rests on Section 266 of the Judicial Code as amended by the Act of February 13, 1925, the decree below being by a specially constituted District Court of three Judges (Judicial Code, Section 266).

The Statute

This case involves the constitutionality of so much of the California Alcoholic Beverage Control Act (Chap. 330, Statutes of 1935) as imposes a license fee of $500 for the privilege of importing beer from outside the State (Sec. 5), and requires any importer of such beer to take out such a license to cover each and every place of business within the State at which he imports beer.[1]

Neither the Constitution nor the statutes of California forbid the manufacture, sale or use of intoxicating liquors. On the contrary, they permit its manufacture and sale by licensees upon the payment of license taxes or fees imposed by the Alcoholic Beverage Control Act. That Act provides for the issuance of different kinds of licenses.

Sec. 3 of the Act reads as follows:

> "Sec. 3. On and after July 1, 1935, no person shall perform any act or acts which would constitute such person a manufacturer, rectifier, importer, wholesaler, or retailer of any alcoholic beverage within the meaning of this act or shall package, label or sell any alcoholic beverage unless such person is authorized to do so by a license duly issued pursuant to the provisions of the State Liquor Control Act, Chapter 558, Statutes of 1933. Any per-

[1]The appellees' bill of complaint by which the jurisdiction of the court below was invoked had annexed thereto as Exhibit A (R. 5 and R. 23) a copy of the Act in question incorporated in the bill with the same force and effect as if set out therein in full (Subdivision IV, R. 5). It was also set out in full in the Findings of Fact of the court below (Subdivision IV, R. 45). It has not been reproduced by the appellants in the printed record, having been set forth in full in the statement of jurisdiction (Jurisdictional Statement 10-55). The full text thereof is set out in the Appendix to this brief. References to the Act will be made both by reference to the Appendix and to the Jurisdictional Statement filed by the appellants in this Court.

son violating any provision of this section shall be guilty of a misdemeanor."

Sec. 2, (k) and (t), define an importer and wholesaler respectively as follows:

> "(k) 'Importer' means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the act of importation is completed.
>
> * * * * * * *
>
> "(t) 'Wholesale sale' or 'sale at wholesale' means a sale to any person for purposes of resale."

Among the licenses provided for are a "beer importer's license", for which the fee charged is $500, and a beer wholesaler's license, for which the fee is $50.[2] (Sec. 5, Item 8, Jurisdictional Statement, p. 15; Appendix, p. v.)

Sec. 6 provides in part as follows:

> "Sec. 6. Except as otherwise provided in this act and subject to the provisions of section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges *and no others* [italics ours] at the premises for which issued during the year for which issued."
>
> * * * * * * *
>
> "(d) Any importer's license authorizes the person to whom issued to become an importer of

---

[2]The applicable statutory provisions are:

"Sec. 5. The following are the types of licenses to be issued under this act and the annual fees to be charged therefor:

"8. Beer importer's license ..... $500.00 per year

"13. Beer and wine wholesaler's license ..... 50.00 per year"

alcoholic beverages specified in the license and to export such alcoholic beverage."

* * * * * *

"(f) Any wholesaler's license authorizes the sale of the alcoholic beverage specified in the license only to persons holding licenses issued by the board authorizing the sale of such alcoholic beverage."

It will thus be observed that the importer's tax is laid solely upon the privilege of importation and does not confer the right to sell, for which purpose the importer must take out the additional wholesaler's license provided for in the statute. The result is that a wholesaler of domestic beer may obtain a license for $50, while a person desiring to import and wholesale beer manufactured without the State must pay (1) a tax of $500 for the privilege of importing such beer and (2) the regular wholesaler's license fee of $50 for selling the beer so imported.[3]

The first paragraph of Sec. 7 (Jurisdictional Statement, p. 18, Appendix, p. viii), provides as follows:

"Sec. 7. Each license issued under this act shall be issued to a specific person, and, except in the case of licenses authorizing the sale of alcoholic beverages on trains or boats, shall be issued for a specific location, the principal address of which shall be indicated on the license. Separate licenses shall be issued for each of the premises of any business establishment having more than one location."

Any wholesaler desiring to import beer for sale at wholesale is therefore required to take out a separate license

[3]Neither the wholesaler of domestic or imported beer may sell at retail, nor may the retailer import for sale (Sec. 3, 6, Jurisdictional Statement, pp. 14, 16; Appendix, pp. iv, vi).

for each separate location at which beer from other states is to be imported.

In addition to providing that any person importing beer, unless holding an importer's license, shall be guilty of a misdemeanor (Sec. 3, Jurisdictional Statement, p. 14; Appendix, p. iv), the Act creates the following additional restrictions and provides for the following additional penalties and forfeitures:

(1) Forbids any common or private carrier to "transport alcoholic beverages into the State" unless "such alcoholic beverages are to be consigned to a licensed importer" and makes it a misdemeanor to violate this provision (Sec. 49, Jurisdictional Statement, pp. 45-46; Appendix, p. xxxiv).

(2) Makes it a misdemeanor for any licensee to have upon the licensed premises "any alcoholic beverages other than the alcoholic beverages which such licensee is authorized to sell at such premises under the license or licenses issued therefor". (Sec. 51, Jurisdictional Statement, p. 46; Appendix, p. xxxiv), and authorizes the Board or its representative to seize and summarily destroy or to sell at public auction any alcoholic beverage found in any premises in violation of this section.[4]

(3) Provides that in the event of failure to pay any tax, interest or penalty imposed by the Act, judgment shall be entered against such delinquent in the Office of the County Clerk of Sacramento

[4]The effect of this is to subject to seizure any imported beer found in the possession of any importer-wholesaler who may have taken out a wholesaler's license but who has not taken out the importer's license provided for in the statute.

County, without trial, upon the filing of a certificate to that effect by the State Controller, upon which judgment execution may issue, as in the case of any other judgment (Sec. 31, Jurisdictional Statement, pp. 30-33; Appendix, p. xix).

The Twenty-first Amendment

The Twenty-first Amendment to the Constitution of the United States reads as follows:

"UNITED STATES CONSTITUTIONAL AMENDMENT

No. XXI.

Repeal of Eighteenth Amendment.

"§1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"§2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"§3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by convention in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

Statement of Case

Each of the appellees is a wholesaler of beer within the State of California, holding a wholesaler's license

enabling it to wholesale beer within that State. For more than one year prior to the bringing of their bill in the Court below, each of the appellees was engaged in the business of importing in interstate commerce by rail, beer manufactured either in the State of Wisconsin or the State of Missouri, the amounts of their respective business in such imported beer ranging from $25,000 per annum in the case of the appellee, Haas Baruch & Company (R. 15), to $400,000 per annum in the case of the appellees, Young's Market Company (R. 12), and Simon Levi Company, Ltd. (R. 13). For the privilege of further engaging in such importation, each of the appellees is required by the statute to pay an importer's license (in addition to its wholesaler's license) of $500 a year at each of the places at which such beer is imported. Appellee Simon Levi Company, Ltd. is engaged in the business of importing and receiving for delivery by rail Schlitz beer manufactured at Milwaukee, Wisconsin, at twelve separate places of business within the State, and is thus required, for the privilege of further engagement in such importation, to pay a tax of $6,000, in addition to a wholesaler's license fee at each of said points (R. 14).

Appellee Young's Market Company is engaged in the business described at three points in the State, requiring payment of license fees of $1,500 for the privilege of importing beer (R. 13).

Appellee Haas Baruch & Company is engaged in the business described at one place of business, appellee Koerber at one place of business, and appellees George P. and George S. Higgins at one place of business (R. 15-17).

The defendants Riley, Corbett, Stewart, Collins and Shontz together comprise the State Board of Equalization

of the State of California, referred to in the Act as the Board (Sec. 2, Jurisdictional Statement, p. 11; Appendix, p. ii) and, as such, are specifically charged with the duty of administering and enforcing the provisions of the Act and with the duty to "prescribe all necessary rules and regulations to carry out" its provisions (R. 4; Alcoholic Beverage Control Act, Sect. 38, Jurisdictional Statement, p. 39; Appendix, p. xxviii). In the performance of this duty, the Board has promulgated rules and regulations, including rules and regulations forbidding the delivery by any carrier, either common or private, of alcoholic beverages shipped into the state from outside, except to a licensed importer, and otherwise regulating conditions of such importation (R. 8). Defendant Merriam is the Governor of the State (R. 3); defendants Stout and Flickinger are, respectively, the Chief Beverage Control Officer and Chief Beverage Control Administrator charged with the duty of administering and enforcing the Act (R. 5). Defendant Webb is the Attorney General of the State charged with the enforcement of the Act in question (R. 5).

The bill alleges that the appellees and each of them have ordered, and intend to order in the future, shipments of beer brewed and manufactured outside the State of California to each of the places and points of business hereinbefore described, to be shipped to their several warehouses thereat, that the railway carriers whose services are required for interstate transportation for the purpose of making delivery at such points have been instructed by defendants not to deliver such shipments; that the delivery thereof, until the appellees shall have taken out at each of said points an importer's license, will be a violation of law, and that the defendants would thereupon cause said

railway carriers to be prosecuted therefor (Sec. XV, R. 18). The Bill further alleges that there are approximately thirty-four breweries in the State of California for the wholesaling of whose beer distributors are not required to pay an importer's license fee of $500, or any other similar tax or license fee (Sec. XVI, R. 18), being permitted to wholesale such beer under a wholesaler's license of $50. The Bill further alleges that their business will be seriously impaired, if not lost or destroyed, without continued engagement in the importation and sale of beer from outside the State; that relying upon provisions of the Constitution of the United States, the appellees have refused to apply for and obtain importers' licenses for each of their various places of business provided for in the Act; that unless restrained and enjoined by the Court the Board "will enforce against plaintiffs and others similarly situated each and all of the provisions of said Alcoholic Beverage Control Act." (Sec. XVI, R. 18-19.)

Charging that the provisions of said Act requiring the taking out of the aforesaid importer's license as a condition precedent to the importation for sale of beer manufactured outside the State, were in violation of Sec. 8 of Article I of the Constitution of the United States, of the Fourteenth Amendment to the Constitution of the United States and of Sec. 2 of Article IV of the Constitution, the appellees brought suit in the United States District Court for the Southern District of California to enjoin the State Board of Equalization of that State and its members from in any manner enforcing against these plaintiffs the provisions of said Act in so far as they affected the right of the plaintiffs to import and sell foreign beer within the State, or from proceeding under said Act against said appellees (R. 21-23).

Temporary injunction was also sought, the appellants (defendants below) interposing a return to an order to show cause (R. 24). Upon the hearing on application for temporary injunction, it was stipulated that the allegations of the Bill, including the allegation that the defendants have threatened to and unless enjoined will enforce all of the provisions of the Act against the appellees and others similarly situated were true, and it was further stipulated that the decree of the Court on temporary injunction "should be a final disposition of this cause without the necessity of further hearing or proof upon the allegations of said bill" (R. 42).

The Court accordingly found the facts as recited in the Bill, and as thus stipulated (R. 41-57), held the Act unconstitutional in so far as it required the appellees and each of them to take out an importer's license at each of the places of business at which it was intended to import beer (R. 57-64), and granted a permanent injunction restraining the appellants (defendants below) from

(*a*) enforcing against the plaintiffs the provisions of said Act:

(*b*) collecting or attempting to collect from the plaintiffs the beer importers' license fees imposed by the Act;

(*c*) instituting or causing to be instituted any prosecution or proceeding, civil or criminal, to enforce any of the provisions of the Act;

(*d*) imposing or attempting to impose any of the penalties of said Act;

(*e*) seizing or attempting to seize any property of the plaintiffs or forfeiting or attempting to forfeit to the State any beer imported into the State for failure to pay said importer's license fee or to procure said license;

(*f*) and interfering with or attempting to prevent any private or common carrier from transporting beer into the State of California, for the sole reason that it was consigned to a person who had not obtained such beer importer's license (R. 62, 63).

From this decree appellants have appealed.

SUMMARY OF ARGUMENT

POINT I—The tax is one imposed solely upon the privilege of engaging in interstate commerce, the effect of which is to discriminate in favor of domestic beer and its wholesalers and against beer received from without the state and its wholesalers.

POINT II—The effect of the Twenty-first Amendment was not to free all liquor legislation of the states, whether wet or dry, from all constitutional limitations arising under the commerce clause in the exercise of the police power of the states.

1. The Twenty-first Amendment is not a grant of power to the states but a limitation upon the restrictions upon the exercise of the state's police power contained in other provisions of the Federal Constitution. The question is the extent to which the application of such restrictions has been removed.

2. The inevitable consequences of appellants' contention that the effect of the Twenty-first Amendment was to free all liquor legislation of the states from all constitutional limitations arising from any other provision of the Constitution or from the Commerce Clause alone are such as to repel its acceptance in the absence of completely convincing evidence that such was its purpose.

3. The historical background of the Amendment lends no support to the contention made but on the contrary requires its rejection.

POINT III—The Twenty-first Amendment does not remove state liquor legislation from the operation of the established principle that matters which are admittedly within the sphere of state power may nevertheless not be so regulated as to discriminate against the products of other states and their manufacturers and dealers, and the Act is therefore invalid.

1. The states may not under the Webb-Kenyon Act and the Twenty-first Amendment exercise their police power so as to discriminate against the products of other states.

2. The discriminatory effect of the California tax is not cured by the tax upon domestic manufacturers.

POINT IV—The act is invalid because it denies to appellees the equal protection of the laws.

POINT V—Finding XV of the court below is fully supported by the record.

ARGUMENT

POINT I

THE TAX IS ONE IMPOSED SOLELY UPON THE PRIVILEGE OF ENGAGING IN INTERSTATE COMMERCE, THE EFFECT OF WHICH IS TO DISCRIMINATE IN FAVOR OF DOMESTIC BEER AND ITS WHOLESALERS AND AGAINST BEER RECEIVED FROM WITHOUT THE STATE AND ITS WHOLESALERS.

The tax is clearly and on its face a tax imposed solely on the privilege of engaging in interstate commerce. The statute in express terms provides that the licenses provided for shall authorize the persons to whom issued to exercise the rights and privileges defined therein and "no others". An importer is defined as a person bringing alcoholic beverages into the state from outside the state and into whose possession they first come (Section 2(k). Jurisdictional Statement, p. 12; Appendix, p. iii). A wholesaler is defined as a person, other than a manufacturer or rectifier, selling alcoholic beverages at wholesale (Sec. 2 (s) and (t), Jurisdictional Statement, p. 13; Appendix, p. iv). The importer's license, for which a license fee of $500 is imposed, authorizes the holder only to bring alcoholic beverages into the state and to export the same from the state, and confers upon him no other privilege, not even the privilege of selling within the state beverages so brought in (Sec. 6 (d), Jurisdictional Statement, p. 15; Appendix, p. vii). This is so because Section 6 provides that a person to whom an importer's license is issued may exercise the privilege of importation only and no other

(Sec. 6, Jurisdictional Statement, p. 16; Appendix, p. vii). There may therefore be no question but that the tax imposed is a tax imposed solely upon the privilege of engaging in interstate commerce, *i.e.*, bringing beer into the state from the outside. As such it is both a tax and a burden upon interstate commerce[1], whether permissible under the Twenty-first Amendment or not.

In order to sell such imported beer within the state the importer must in addition take out a wholesaler's license. As said in *Brown* v. *Maryland*, 12 Wheat. 419, 447:

> "Sale is the object of importation, and it is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself."[2]

The appellees are wholesalers of beer manufactured outside the state. It is brought in by them solely for purposes of sale. They are wholesalers of imported beer. That is their business. The tax is not confined to those who import for export only but applies to those who import for sale at wholesale within the state as well. It was intended so to apply. In order to sell the beer, for the privilege of whose importation the appellees are required to

---

[1] *Robbins* v. *Taxing District of Shelby County*, 120 U. S. 489; *Corson* v. *Maryland*, 120 U. S. 502; *Asher* v. *Texas*, 128 U. S. 129; *Brennan* v. *City of Titusville*, 153 U. S. 289; *Stockard* v. *Morgan*, 185 U. S. 27; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Norfolk & W. Ry.* v. *Sims*, 191 U. S. 441; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Dozier* v. *Alabama*, 218 U. S. 124; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Stewart* v. *Michigan*, 232 U. S. 665; *Davis* v. *Virginia*, 236 U. S. 697; *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346; *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325.

[2] While this was said in a case involving the imposition of an occupation tax upon importation of foreign goods, it is as true when applied to an importer of goods made within another state.

pay a license tax of $500, they are also required to take out the ordinary wholesaler's license, for which the license fee is $50. The wholesaler of imported beer is therefore required to take out two licenses and pay a tax of $550 while the wholesaler of domestic beer is required to pay but $50. The only difference between the two is the origin of the beer, one being of interstate origin and the other of domestic origin. It may be said that a person holding a wholesaler's license but not an import license may wholesale either foreign beer or domestic beer, and this is true. But the import wholesaler is nevertheless a wholesaler. It is only for the purpose of wholesaling that he imports. The tax therefore is not only one exacted exclusively for the privilege of engaging in interstate commerce, but one the effect of which is to discriminate in favor of domestic beer and a wholesaler thereof and against out-state beer and the wholesaler thereof, the sole ground of the discrimination being that the latter is engaged in the wholesale distribution of beer brought into the state by him from the outside.

In determining the validity of a state law, whether enacted in the exercise of the taxing power, police power, or both, the court will consider its practical operation and effect. *Mountain Timber Company* v. *Washington*, 243 U. S. 219, 237. In its practical operation and effect the tax is not only one imposed upon the privilege of engaging in interstate commerce, but one which discriminates against the import wholesaler and in favor of the domestic wholesaler by requiring the former to pay a higher tax than the latter. That such is its practical operation and effect cannot be successfully denied.

POINT II

THE EFFECT OF THE TWENTY-FIRST AMENDMENT WAS NOT TO FREE ALL LIQUOR LEGISLATION OF THE STATES, WHETHER WET OR DRY, FROM ALL CONSTITUTIONAL LIMITATIONS ARISING UNDER THE COMMERCE CLAUSE IN THE EXERCISE OF THE POLICE POWER OF THE STATES.

1. The Twenty-first Amendment is not a grant of power to the States but a limitation upon the restrictions upon the exercise of the State's police power contained in other provisions of the Federal Constitution. The question is the extent to which the application of such restrictions has been removed.

The Twenty-first Amendment is not a grant of power to the States. It is not in the nature of an enabling act conferring upon the States authority to legislate upon subjects theretofore withdrawn from their control. The Federal Constitution is not the source of the State's police power. Its exercise, however, is limited by various provisions of the Federal Constitution, such as the Commerce Clause, the Due Process Clause, the Equal Protection Clause, the Privileges and Immunities of Citizenship Clause, and the clause forbidding the exaction of import duties. The effect of the Twenty-first Amendment is not to confer upon the States affirmatively the power to legislate but to limit, to the extent provided for and intended by the Amendment, the application of other clauses of the Constitution which, except for the Amendment, would constitute a restraint upon the exercise of the State's police power.

The question is as to the extent to which such restrictions or limitations have been removed. In the last analysis the contention of the appellants is that all restrictions upon the exercise of the police power in respect of liquor have been removed and the States restored to their full sovereignty thereover just as though they were not members of the Federal Union. With this we disagree. Unless such is the effect of the Amendment, the question therefore is, to what extent the exercise of the State's police power is still limited by the Commerce or other Clauses of the Constitution.

The Amendment prohibits the "transportation or importation" of intoxicating liquors into a State for delivery or use in violation of its laws. Manifestly, this means in violation of a valid law of the State. The real question presented, therefore, is the extent to which the validity of such a law may still be tested by other provisions of the Constitution as construed by this Court.

Prior to the enactment of the Wilson Act, it was held that the police power of the State did not attach to intoxicating liquors brought into the State from the outside until after sale in the original package. *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100. To meet this situation the Wilson Act was passed. That Act was thereafter interpreted by this Court as not applying to shipments of liquor consigned to a person within a dry state or dry territory for his own personal use. *Rhodes* v. *Iowa*, 170 U. S. 412; *American Express Company* v. *Iowa*, 196 U. S. 133; *Heyman* v. *Southern Railway Company*, 203 U. S. 270; *Louisville & Nashville Railroad* v. *Cook Brewing Company*, 223 U. S. 70. To meet this situation the Webb-Kenyon Act was

passed. Both had a common purpose—to prevent the abuse of the use of the channels of interstate commerce to defeat the enforcement of State laws by removing, to the extent provided by those Acts, but only to such extent, the limitations upon the police power contained in other clauses of the Constitution, particularly the Commerce Clause. This it did under the Wilson Act, as construed by the Court, by subjecting intoxicating liquor to the exercise of the police power upon its arrival within the State for purposes of sale. Like the Twenty-first Amendment, the Wilson Act was not a grant of power to the State, but a limitation upon the restrictions of the Commerce Clause upon the police power, accomplished by subjecting intoxicating liquor to the police power of the State upon arrival for purposes of sale. *In re Rahrer*, 140 U. S. 545. The Court having held that the police power did not attach in respect of interstate liquor consigned to a person in the State, not for sale but for his own personal use, the effect of the Webb-Kenyon Act, and the only effect, was to subject interstate liquor to the exercise of the police power upon its arrival within the State, and thus prevent its transportation and delivery therein contrary to State law.[1] The purpose of the Twenty-first Amendment was to write into the Constitution, upon the repeal of the Eighteenth Amendment, the limitations upon the application of the police power contained in the Webb-Kenyon Act, but no farther.[2]

---

[1]The effect of both statutes, therefore, was merely to subject intoxicating liquors to the police power earlier than they would have been subjected but for the passage of these Acts, by removing what would otherwise be the bar of the Commerce Clause thereto.

[2]That the foregoing is an accurate description of the purposes and effect of the Wilson Act and Webb-Kenyon Act, and of the relation of the Twenty-first Amendment thereto, see Point III, p. 57, *post*.

It is obvious that a mere acceleration of the point of time at which intoxicating liquors may become subject to the police power does not and cannot of itself remove limitations upon that power contained in other clauses of the Constitution, irrespective of the question as to whether the police power, exercised with due regard to such restrictions, has attached or not.

While the Wilson Act and the Webb-Kenyon Act had a common purpose, viz., acceleration of the time at which intoxicating liquor might become subject to the police power of the States, there is nothing either in the text of either of those Acts, nor in the construction placed upon them by the Supreme Court, that would warrant the contention that the effect of those laws was to remove *all* constitutional restrictions upon the exercise of the police power in respect of intoxicating liquor.

On the contrary, the Court held in *Scott* v. *Donald,* 165 U. S. 58, that, under the Wilson Act, the police powers of the State were still subject to the Commerce Clause to the extent that the State in regulating the sale of liquors could not discriminate against interstate commerce by discriminating against liquor coming into the State from the outside. This was not based upon the original package doctrine, which had been excluded from operation by the Wilson Act, or upon any question as to whether liquor, brought into the State, was subject to the police power, or not. It was based upon the broad doctrine so often reiterated by this Court in countless cases, that a State may not, in the exercise of the police power, even when it has attached, discriminate against articles of interstate commerce in favor of articles of domestic production.[4] There

[4]See Point III, p. 57, *post.*

is nothing in the legislative history of either of these Acts or their text, in the legislative history or text of the Twenty-first Amendment, or in the decisions of this Court, to warrant the contention that the effect of either of these Acts or of the Twenty-first Amendment, the purpose of which was to carry them into the Constitution, was to withdraw the exercise of the police power in respect of intoxicating liquor from *all* limitations thereon, contained in other clauses of the Constitution, including the Commerce Clause.

2. The inevitable consequences of appellant's contention that the effect of the Twenty-first Amendment was to free all liquor legislation of the states from all constitutional limitations arising from any other provision of the Constitution or from the Commerce Clause alone are such as to repel its acceptance in the absence of completely convincing evidence that such was its purpose.

In its last analysis the contention of the appellants is that the effect of the Twenty-first Amendment was to free all liquor legislation of the states from all restrictions upon the police power to be found in other provisions of the Constitution. Unless it can sustain this contention, this act is clearly bad for reasons hereinafter set forth (Point III, p. 57, *post*). At page 42 of the appellants' brief it is said that the intent of the Amendment is

> "to restore to the several States their full sovereignty in the control and handling of the liquor problem".

At page 19, it is said:

> "The effect of the 21st Amendment is to restore to the states their full, original sovereignty to deal

with intoxicating liquors within their boundaries as they see fit, free from any restrictions of interstate commerce."

If it be true that the state has been restored to its full sovereignty or, if not, has been relieved from all restrictions upon the exercise of its police power arising from the Commerce Clause, then it would be competent for a state, while permitting the manufacture and sale of liquor within its own borders, to prohibit the importation of liquor therein from outside the state, whether from other states or foreign countries. And this would follow whether the immunity claimed applies only to the Commerce Clause or to all other clauses of the Constitution. It is well settled that a state, under the guise of exercising its police power, may not enact legislation the purpose of which is either to retain the products of that state for the use of its own citizens, *West* v. *Kansas Natural Gas Company,* 221 U. S. 229; *Foster Packing Company* v. *Haydel,* 278 U. S. 1; *Pennsylvania* v. *West Virginia,* 262 U. S. 553; or to favor its own products at the expense of products produced outside the state by prohibiting or limiting the introduction of the latter, *Hannibal & St. Jos. R. Co.* v. *Husen,* 95 U. S. 465; *Minnesota* v. *Barber,* 136 U. S. 313; *Walling* v. *Michigan,* 116 U. S. 446; *cf. Baldwin* v. *Seelig,* 294 U. S. 511. The sole basis of these decisions is the Commerce Clause. If, therefore, the restrictions of this clause upon the exercise of the police power have been wholly removed, a state, while permitting the manufacture and sale of intoxicating liquors within its own borders, as California has done, could prohibit altogether the importation of liquors from other states or from abroad. To permit this would be contrary to the whole scheme of the Constitution.

Moreover, if the Amendment has the effect asserted, a state, while permitting the manufacture and sale of liquor within its own borders, may prohibit its introduction from certain states and countries and permit its introduction from others. This is so because it is only the Commerce Clause which forbids such discrimination. This ~~act~~ Amendment by its terms applies equally to "importation" from foreign countries as to "transportation" from sister states. If the ~~act~~ Amendment is to be given the interpretation asserted, then a state, while permitting the manufacture and sale of intoxicating liquors within its own borders, could prohibit their importation from foreign countries. Only the Commerce Clause forbids.

These illustrations alone are sufficient to compel the rejection of the contention made.

It has also been held that the Commerce clause forbids a state from taxing articles or transactions in articles which had their origin in another state at a higher rate than that imposed on similar articles or transactions in articles of domestic origin because of the resulting burden upon, interference with and discrimination against interstate commerce. *Welton* v. *Missouri,* 91 U. S. 275; *Cook* v. *Pennsylvania,* 97 U. S. 566; *Tiernan* v. *Rinker,* 102 U. S. 123; *Webber* v. *Virginia,* 103 U. S. 344; *Scott* v. *Donald,* 165 U. S. 58; *Darnell & Son Co.* v. *Memphis,* 208 U. S. 113; *Cf. Minnesota* v. *Barber,* 136 U. S. 313; *Brimmer* v. *Rebman,* 138 U. S. 78; *Voight* v. *Wright,* 141 U. S. 62; *Vance* v. *Vandercook Co.,* 170 U. S. 438; *Armour & Co.* v. *Virginia,* 246 U. S. 1; *Bethlehem Motors Corp.* v. *Flynt,* 256 U. S. 421. The California act in question levies an excise tax of 62½ cents per barrel upon all beer (Section 23, Jurisdictional Statement, p. 23; Appendix, pp. xiii).

This tax applies equally to beer of domestic manufacture and to beer introduced into the state from the outside. As such it is clearly valid. If, however, the act sought to levy a tax of double this amount on beer brought into the state from the outside, it would be as clearly void under the authorities cited. If, however, the effect of the Amendment is to withdraw altogether the restrictions upon state power arising out of the Commerce Clause, such a discriminatory tax would be valid.

We have already pointed out that the Amendment by its terms prohibits the "importation" of liquor into the state in violation of its laws, as well as its "transportation". Obviously, the two words were not used synonymously. The former was intended to cover importation in the legal and technical sense *i.e.* importation from abroad. Section 10 of Article I of the Constitution prohibits any state, without the consent of Congress, from laying any imposts or duties on imports except as "absolutely necessary for executing its inspection laws". If the effect of the ~~act~~ Amendment as contended is to grant complete immunity to the extent of the subject matter covered, which covers importation from abroad as well as transportation from another state, it would be competent for a state to impose an import tax upon the importation of foreign liquor freed from this provision of the Constitution. Importation of such foreign liquor within a state without payment of an import tax exacted by state laws would be an importation for delivery or use in violation of the laws of the state, if by that is meant the mere existence on the statute books of a law duly enacted in the manner required by the state constitution. The appellees in this case are not importers of foreign liquors. They are, therefore, in no position to

urge the unconstitutionality of this statute as applied to the importers of foreign liquor to whom, however, it applies as well as to importers of liquor produced in another state. We are now, however, discussing the meaning of the Amendment and the effect of giving it the interpretation placed upon it by the appellants. If it has the meaning assigned to it, then clearly the prohibition contained in this section of the Constitution, as well as those arising from the Commerce Clause, has been removed in respect of all liquor legislation by the states. Obviously, the Amendment was not intended to be given any such interpretation.

It is unthinkable that either Congress or the people should have intended by this Amendment to produce the results inevitably resulting from the adoption of the state's contention. It is unthinkable that this Court will so construe it. The Constitution is to be construed as a whole and each clause given a scope and effect consistent with the nature and objects of the Federal Union and the provisions of all other parts of the instrument. *Prout* v. *Starr,* 188 U. S. 537, 543; Story, Com. Sec. 405; Willoughby, Const. Law, 2nd Ed., 1929, Sec. 40; *cf.* Sec. 42. This is as true of the Twenty-first Amendment as of any other amendment.

It is a well-recognized canon of statutory construction that a statute is not to be given an interpretation leading to absurd or grotesque results. The same principle is equally applicable to the interpretation of constitutional provisions, if not more so. The results flowing from the interpretation placed upon the Amendment by the appellants are not only absurd and grotesque but inconsistent with accepted principles of constitutional law which have been announced by this Court.

However broad or narrow the extent of immunity from other constitutional provisions conferred by the Twenty-first Amendment, that Amendment did not have the effect of removing liquor legislation from the reach of all other provisions of the Constitution or altogether from the reach of the Commerce Clause. Only most clear and convincing evidence that such was its intent would warrant the adoption of such an interpretation.

3. The historical background of the Amendment lends no support to the contention made but on the contrary requires its rejection.

a. THE APPLICABLE RULES OF CONSTITUTIONAL INTERPRETATION.

In *Evans* v. *Gore,* 253 U. S. 245, this Court had before it the question of construing an amendment to the Constitution in relation to other constitutional provisions contended to be inconsistent therewith. In construing the effect of this amendment it was said:

> "In *Knowlton* v. *Moore,* 178 U. S. 95, this court said: 'The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning.' This sound rule is as applicable to the Amendments as to the provisions of the original Constitution.

> "Let us turn then to the circumstances in which this Amendment was proposed and ratified and to the controversy it was intended to settle" (p. 259).

As this Court said in the above quoted case, let us turn to the controversy it was intended to settle, the safe way, in the construction of amendments, being, as stated in *Maxwell* v. *Dow,* 176 U. S. 581, 602, "to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expression, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted." Let us see what "the known condition of affairs" was that this amendment was designed to remedy. This condition can only be revealed in the history of the legislative enactments and the judicial decisions concerning this subject.

b. The relation between the Twenty-first Amendment and the Webb-Kenyon Act.

Language which may be thought wholly free from ambiguity in the abstract may, as applied to a given situation, become uncertain and difficult of construction. By its language the amendment limits its prohibition to the transportation into a state "in violation of the laws thereof." In violation of what laws of the state? What are the laws of the state? Within what sphere may the enactments of the state become laws?

Such are only a few of the questions that are instantly suggested in the construction of this Amendment. The language cannot be removed from the setting which gives it its cast. The purposes of its adoption, the objects sought

to be obtained, and the conditions sought to be remedied furnish the background for determining its meaning. If we are to take the language of Senator Borah, as used in the debates upon the proposed amendment in the Senate, and which fairly reflects the views of that body in its consideration of the same, we find the purpose expressed as follows:

> "All this (conditions arising from the inability of states to exercise their police powers upon interstate commerce) was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the states of incorporating it, permanently in the Constitution of the United States." (Vol. 76, Congressional Record, p. 4172.)

And well could this be the only view concerning the purpose of this Amendment in the light of its identity of language with the Webb-Kenyon Act. A comparison of the language of the Webb-Kenyon Act with the Twenty-first Amendment will reveal that the latter is but an epitome of the former, the words used being identical in all respects with the Webb-Kenyon Act save for the omission of unnecessary verbiage.

Section 2 of the Twenty-first Amendment reads as follows:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Webb-Kenyon Act (37 Stat. 699 (1913); re-enacted, 49 Stat. 877 (1935), 27 U. S. C. § 122), omitting extraneous words,[1] reads as follows:

> "The shipment or transportation * * * of any * * * intoxicating liquor * * * from one State * * * into any other State * * * which said * * * intoxicating liquor is intended * * * to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State * * * is hereby prohibited."

At this point the views of appellants and appellees are in entire harmony. Appellants in their argument (p. 35) state: "The Webb-Kenyon Act is the congressional prototype of the Twenty-first Amendment." No claim is, or fairly could be, made by appellants that under the Twenty-first Amendment the power of the state is any broader or different than the power which it had previous to the Eighteenth Amendment under the Webb-Kenyon Act. It is in the purposes which were sought to be accomplished by the

---

[1]The Webb-Kenyon Act in full reads as follows:

> "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

Webb-Kenyon Act and by the Twenty-first Amendment and the effect which is to be given to the Amendment that the views of the parties to this appeal conflict.

c. THE EFFECT OF THE COMMERCE CLAUSE PRIOR TO THE WILSON ACT IN PREVENTING THE STATES FROM SUBJECTING INTERSTATE COMMERCE IN LIQUOR TO NON-DISCRIMINATORY REGULATION.

For more than fifty years following the adoption of our Constitution, numerous states, through their legislative acts, expressed a determined policy of control over the liquor traffic. Until within a few years of the close of the past century, states, such as Iowa and Kansas, had adopted legislation prohibiting absolutely the manufacture, transportation, and sale of intoxicating liquor. The power of a state to prohibit absolutely the manufacture of intoxicating liquor within its borders, and to deny to any person the use of his property for such purpose, was before this court in the year 1887 in *Mugler* v. *Kansas,* 123 U. S. 623, where it was held that no constitutional rights or guaranties were infringed by such legislation. No questions relating to interstate commerce in liquor were involved in that opinion, the court expressly holding that the contention that a state forbidding the manufacture of beer for exportation was interfering with interstate commerce was not before the court under the facts presented, and, therefore, no opinion was expressed thereon.

While it was thus recognized that a state had the power to prohibit absolutely all intrastate trade in liquors, the limitation resulting from the Commerce Clause upon the exercise of state power to carry out its policy of prohibi-

tion within its borders found expression in the case of *Bowman* v. *Chicago & Northwestern Railway,* 125 U. S. 465, decided in 1888. In that case a statute of the state of Iowa prohibited carriers from bringing intoxicating liquors within that state or transporting them between points within the state unless they were consigned to persons duly licensed to sell the same under the laws of the state. The Railway Company refused to accept a consignment of liquor from appellants at Chicago to be shipped to them in Iowa because they were not licensed to sell liquor in Iowa. Thereupon action was brought for damages occasioned by such refusal. The defense was asserted by the Railway Company that to carry the beer into Iowa would have been in violation of the state law. It was held by this Court that the provisions of the Iowa law restricted commerce and, therefore, were unconstitutional.

This case marked the first step in the recognition of the right of a non-resident to ship from another state in interstate commerce liquors consigned to within the state, to be used in violation of the statutes of such state, and the immunity of such commerce was quickly availed of to build up an extensive interstate business in liquors. The protection of interstate commerce was used not only to enable the carrying on of such interstate business, but to accomplish the sale of liquors after receipt thereof within the state but while within their original package. Thus, while a state had done all in its power to declare and enforce its policy of prohibition, it was entirely thwarted in its purpose through use of the channels of interstate commerce. That such protection extended to sales in the original packages was confirmed by this Court in the case of *Leisy* v. *Hardin,* 135 U. S. 100, decided two years after the *Bowman* case.

d. THE WILSON ACT.

(1) *The adoption of the Wilson Act.*

The clamor for protection against the use of such means to thwart a dry state's policy was loud and immediate. The complaint was that the states had no shield to protect them in their own state policies. Search for means of satisfying such demand was not difficult. In the very opinion in which the immunity of the interstate business was so completely recognized, this Court pointed the way by which the evil might be remedied by reference to the language of the early *License Cases* in which it was said:

> "It may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other states or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other states of the Union in order to effect its end, however desirable such regulation."

The response to the demand following this suggestion of the Court was, within four months after the decision in *Leisy* v. *Hardin,* expressed by Congress in the enactment of the Wilson Act, which provided as follows:

> "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such

> State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise."

(2) *The constitutionality of the Wilson Act.*

Within two weeks after the adoption of the Wilson Act the state of Kansas arrested a person named Rahrer who was conducting a business of selling, within the state, in the original packages, intoxicating liquors manufactured outside the state. The unconstitutionality of the Act was asserted as a defense to the prosecution, and the challenge reached this Court in 1891 in *In re Rahrer,* 140 U. S. 545. The contention was then made that Congress had, by the Wilson Act, delegated its power to regulate commerce to the states, and that a power reposed in Congress by the Constitution was not subject to delegation. This Court disposed of the question adversely on the theory that no power was granted to the state by the Act; that the police powers of the state had at all times rested in it under its reserved powers, the Court saying:

> "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction. * * *

> 'The power to establish such regulations' (police regulations) as was said in *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, 'reaches everything within the territory of a State not surrendered to the national government.' But it was not thought in that case that the record presented any question of the invalidity of state laws, because repugnant to the power to regulate commerce among the States. It is upon the theory of such repugnancy that the case before us arises, and involves the distinction which exists between the *commercial power* and the *police power*, which 'though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them' " (pp. 564, 556).

Thus the states, in acting under the Wilson Act, were exercising no power conferred by that Act. The commercial power was held to reside in Congress, where it was placed by the Constitution, while the police power of the states was allowed by the Act simply to extend its effect over a field theretofore denied it because of the commerce protection.

e. THE WEBB-KENYON ACT.

(1) *The circumstances leading to the adoption of the Webb-Kenyon Act.*

The Wilson Act having now received the judicial approval of this Court, every need of a state for a shield to protect it against the defeat of its own policy regarding intoxicants through the introduction of liquors from other

states was thought satisfied. The problem was not so immediately solved. Seven years after the decision in the *Rahrer* case, the Act came back to this Court for construction in the case of *Rhodes* v. *Iowa,* 170 U. S. 412. The state of Iowa had prohibited the transportation of liquor, from either within or without the state, to consignees not duly authorized to sell liquor. The issue presented was whether a railroad employee could be punished for having moved within the state liquor from another state consigned to one not authorized to sell it. The troublesome question arose out of the construction to be given the word "arrival" as used in the Act. It was held that "arrival" meant completion of the transportation within the state and delivery to the consignee, and that until the interstate transaction had been consummated by delivery to the consignee, the state was powerless to interfere therewith, even in a non-discriminatory manner.

The result of this decision was that the evils sought to be curbed by the passage of the Act were only partially met. It is true that a state was permitted to prohibit[1] or tax[2] the sale of liquor brought in from other states or from foreign countries,[3] even though in the original package. Under the Act the state could require all liquor, including liquor from other states, to be sold in the first place to a state dispensary[4] and the state could prohibit the personal solicitation of orders within the state for shipments from

---

[1]*In re Rahrer,* 140 U. S. 545 (1891).

[2]*Pabst Brewing Company* v. *Crenshaw,* 198 U. S. 17 (1905); *Foppiano* v. *Speed,* 199 U. S. 501 (1905); *Phillips* v. *Mobile,* 208 U. S. 472 (1908).

[3]*De Bary* v. *Louisiana,* 227 U. S. 108 (1913).

[4]*Vance* v. *Vandercook Company,* 170 U. S. 438 (1898).

the outside.[5] But these extensions of state power were of little avail to stem the interstate flow of liquor protected by the decision in the *Rhodes* case and by subsequent decisions. Not only was the state unable to prevent carriers from bringing liquor into the state consigned to persons not authorized to sell it, but it could not regulate liquor coming in from other states until after it had been delivered to the consignee.[6] No special circumstances mitigated the application of this rule; it applied even though the consignee was known to be a habitual drunkard.[7] Neither could the state prevent c. o. d. sales of liquor to its residents.[8]

Two cases which were decided after the Webb-Kenyon Act was enacted, but which arose before, supply graphic descriptions of the flagrant and open manner in which the state's attempts to prohibit or regulate traffic in liquors within its own borders were defeated under the interpretation which had been placed upon the Wilson Act. The State of Kansas prohibited absolutely the manufacture and sale of intoxicating liquors. A citizen of a Kansas town bordering on Mississippi had conducted an illicit liquor business in Kansas. He found the local regulations troublesome and moved his business across the river, where he opened an office and a warehouse. There he received orders for liquor from persons in Kansas by telephone and mail, and made daily deliveries across the river by wagon. He even advertised in the Kansas newspapers. It was held in *Kirmeyer* v. *Kansas,* 236 U. S. 568 (1915), that under the

---

[5]*Delamater* v. *South Dakota,* 205 U. S. 93 (1907).

[6]*Rhodes* v. *Iowa,* 170 U. S. 412; *Louisville & Nashville R.R. Company* v. *Cook Brewing Company,* 223 U. S. 70 (1912); *Heyman* v. *Southern Railway Co.,* 203 U. S. 270 (1906).

[7]*Adams Express Company* v. *Kentucky,* 214 U. S. 218 (1909).

[8]*American Express Company* v. *Iowa,* 196 U. S. 133 (1905).

Wilson Act the State of Kansas was powerless to remedy this situation. Similarly, in *Rossi* v. *Pennsylvania*, 238 U. S. 62 (1915), it was held that a person who made deliveries from Ohio into Pennsylvania by wagon was immune from a Pennsylvania law requiring all sellers of liquor to be licensed.

These numerous restrictions on the power of a state, even after the enactment of the Wilson Act, to effectuate its own policy with respect to liquor leave no doubt as to the type of situation which was intended to be remedied by the Webb-Kenyon Act. The two cases last cited arose just before the Webb-Kenyon Act was adopted. Other cases limiting the states' power in the manner just described preceded the adoption of the Webb-Kenyon Act by only a few years.[9] On the other hand, only one case decided under the Wilson Act invalidated state regulation because it was discriminatory, and that case was decided sixteen years before the enactment of the Webb-Kenyon Act. *Scott* v. *Donald*, 165 U. S. 58 (1897). In that case the liquor dispensary statute of the State of South Carolina was held invalid because of particular features of the system which were discriminatory. These features consisted of a provision which limited the profit which the dispensary might make from dealing in local wines without similar restriction with respect to foreign wines, a provision that the State Board should give preference in purchases to domestic products, and a provision that the State Board should sell its impure liquors in other states. It can hardly be thought that the court's invalidation of discriminations of this kind,

[9] *Adams Express Company* v. *Kentucky*, 214 U. S. 218 (1909); *Louisville & Nashville Railroad* v. *Cook Brewing Company*, 223 U. S. 70 (1912); *American Express Company* v. *Iowa*, 196 U. S. 133 (1905).

seventeen years before the enactment of the Webb-Kenyon Act, was any part of the situation which caused the enactment of the Webb-Kenyon Act. That the invalidation of discriminations of the character in *Scott* v. *Donald* constituted no serious limitation to the power of that state to regulate its liquor traffic is brought out by the fact that in *Vance* v. *Vandercook Company,* 170 U. S. 438 (1898), the court sustained a South Carolina statute setting up a dispensary system substantially like that created by the statute involved in *Scott* v. *Donald,* with the discriminatory features removed.[10] On the other hand, in the *Vance* case the court invalidated a new minor discriminatory feature of the South Carolina Act, and in two later cases[11] it reasserted the principle that a state might not discriminate against interstate transactions in liquor even in its regulations of matters which had been subjected to state control by the Wilson Act, but found that the statutes presented in those two cases created no discrimination.

Thus it appears that under the Wilson Act the police power of the states, though attaching, could not be exercised to discriminate against foreign products, but that this limitation upon state power caused the invalidation

---

[10]In the *Vance* case the court invalidated a new discrimination of a minor character in the South Carolina Act while sustaining the Act as a whole. This discrimination arose from a provision that shipments of intoxicating liquors from other states to residents of South Carolina for their own use could be made only after the resident should have submitted to a state chemist a sample and should have received from him a certificate, which should be good for only sixty days and might be used for only one importation. This particular provision was sought to be sustained as an inspection law, but the court had no trouble in finding that it was designed to discriminate against liquor from other states in favor of domestic liquor. It will be noted that this decision was fifteen years before the enactment of the Webb-Kenyon Act.

[11]*Reymann Brewing Company* v. *Brister,* 179 U. S. 445 (1900); *Brown-Forman Company* v. *Kentucky,* 217 U. S. 563 (1910).

of no state statute for a period of fifteen years before the enactment of the Webb-Kenyon Act. On the other hand, it appears that over the entire period from the enactment of the Wilson Act in 1890 until the enactment of the Webb-Kenyon Act in 1913, the court by repeated decisions invalidated state liquor legislation which operated in the same manner and without discrimination upon liquor of domestic and foreign origin. It is apparent, therefore, that the construction placed upon the Wilson Act by this Court in *Rhodes* v. *Iowa,* and not that placed thereon in *Scott* v. *Donald,* was the immediate and inducing cause of the Webb-Kenyon Act.

(2) *The adoption of the Webb-Kenyon Act.*

The evils sought to be remedied and the conditions under which they arose are reflected in the debates in Congress prior to the passage of the Webb-Kenyon Act wherein reference only was made to the situation growing out of the *Rhodes* v. *Iowa* case. It was said by Senator Kenyon:

> "Every state in which the traffic in liquors has been prohibited by law is deluged with whiskey sent in by people from other states under the shelter of the interstate commerce law. There are daily trainloads of liquors in bottles, jugs, and other packages sent into the state consigned to persons, real and fictitious, and every railway station and every express company office in the state are converted into the most extensive and active whiskey shops from which whiskey is openly distributed in great quantities. Liquor dealers in other states secure the names of all persons in a community, and through the mails flood them with advertisements of whiskey, with the most liberal and attractive proposi-

> tions for the sale and shipment of the same. Freed from the expense of the middleman, the distiller or dealer in other states is enabled to sell to the individual in the prohibition state at a less price than the purchaser formerly paid to the domestic whiskey dealer. It is evident that under such circumstances the prohibition law of a state is practically nullified, and intoxicating liquors are imposed upon its people against the will of the majority." (Vol. 49, Congressional Record, p. 761.)

Unto such a heritage was the Webb-Kenyon Act born.

The fallacy of the argument of appellants in attempting to use debates as a means to ascertain the intent behind a legislative enactment is well exemplified by the use which appellants make of their references to such debates upon the Webb-Kenyon Act. Appellant sets out a few extracts divorced entirely from the subject of the debate to support an unsound position. It is sought to be made to appear by appellants that the very question which now arises in the construction of the Twenty-first Amendment was debated in Congress under the Webb-Kenyon Act, and that over a strong protest the language used in the Webb-Kenyon Act was selected in order to permit a state to deal arbitrarily and discriminatorily with liquors manufactured outside its borders. To support this argument, reference is made to the bill in the form in which it emanated from the Judiciary Committee of the Senate. Neither the legislative history of the Act nor the debates concerning it furnish the slightest support for such position. A careful reading of the Congressional Record fails to disclose the slightest evidence to support the contention so made. On the contrary, such research discloses that the proposi-

tion is best stated in the language of Senator Kenyon who said;

> "Its purpose, and its only purpose, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic or control of intoxicating liquors within their borders. It is the spirit of our times and the genius of our institutions that each state should exercise its police power free from impediments that might spring from a narrow construction of the interstate commerce clause. Where a state has determined that intoxicating liquors shall not be manufactured or sold within its borders, *is it not manifest that the citizens of other states should not be granted greater privileges in that state than its own citizenship enjoy?*" (Vol. 49, Congressional Record, p. 707.)

As set forth in the Appendix to Appellants' argument (pp. 95, 96) the bill as it emanated from the Senate Committee contained two sections: the first, with but slight change, was retained in the act adopted, the second, was omitted. The occasion for revising the original draft by eliminating the second section was not, as contended by appellants, to make discrimination by a state against out-of-state liquors possible, but to (1) avoid an apparent inconsistency between the two sections, and (2) remove possible doubts as to its constitutionality. As was said by Senator Sutherland (now Mr. Justice Sutherland):

> "Section 1 seeks to do precisely the same thing by legislation so worded as to obscure its real intent; in other words, section 2 does directly what section 1 does indirectly." (Vol. 49, Congressional Record, p. 2904.)

In the language of Senator Kenyon:

> "Now I think no lawyer who is honest with himself and perfectly frank will deny that there are very close constitutional questions involved in this bill, and especially as to section 2." (Vol. 49, Congressional Record, p. 707.)

And, as said by Senator Paynter:

> "Section 2 is inconsistent with Section 1, as this section allows intoxicating liquor to be seized upon arrival in a state, regardless of the question of intent of those who had a direct or indirect interest in it." (Vol. 49, Congressional Record, pp. 2687, 8.)

And by Senator Borah:

> "I do not believe the second section of the bill is constitutional. I believe it establishes a different rule and involves a different principle from that involved in the first section, and it was my purpose to state why I entertained that view. I shall not do so, however, in view of the fact that I understand the parties in charge of the bill are going to offer as a substitute for this bill the one that passed the House known as the Webb bill, and which is in effect the first section of this bill." (Vol. 49, Congressional Record, p. 2919.)

Because in the *Rhodes* case the Court had expressly refused to mark the boundaries of commerce and the extent to which Congress could go in defining what was or was not commerce, Congress, as evidenced by the foregoing debates, determined to avoid, if possible, constitutional doubts.

The views evidenced by the statements of the foregoing Senators in the debates are not selected or isolated state-

ments but are representative of the whole debates on this subject. Whatever differences of opinion may have existed between the Senators on the question of the constitutionality of the second section, one thing is placed beyond the shadow of a doubt and that is that by eliminating it from the bill Congress did not design the accomplishment of that for which appellants now contend. No suggestion of such purpose is found in any of the statements of the Senators on the subject.

Appellants also lay stress upon the veto message of President Taft, contending that the veto was based upon the recognition of the existence of the power in a state as contended for by appellants. This message is quoted in full as Appendix C (p. lii) to this brief. The purpose alleged by appellants finds no expression in the message at any point. The language quoted by appellants to sustain their contention is language used by President Taft to express his views that the Act was an unconstitutional delegation of commercial power, a contention that was rejected by this Court in *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311.

(3) *The effect of the Webb-Kenyon Act in extending the police power of the States to aspects of interstate commerce in liquor which had theretofore been immune from any exercise of that power.*

As previously indicated the Twenty-first Amendment is but the Webb-Kenyon Act in constitutional form. Rules of construction would not permit the giving of a different meaning to the language employed in the Webb-Kenyon Act than is given to the language in the Twenty-first

Amendment. Language taken from a statute surely does not assume a new meaning because it is put in permanent form by constitutional amendment. The Webb-Kenyon Act being merely an extension of the principles of the Wilson Act, and so emphasized in the debates before Congress, it remained only for this Court to so declare it when the constitutionality of that Act came before it in the *Clark Distilling Co.* case, in which this Court said:

> "Reading the Webb-Kenyon Act in the light thus thrown upon it by the Wilson Act and the decisions of this Court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught" (pp. 323, 324).

And, again:

> "As the power to regulate which was manifested in the Wilson Act, and that which was exerted in enacting the Webb-Kenyon law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other, * * *" (p. 30).

In the earlier case of *Adams Express Company* v. *Kentucky*, 238 U. S. 190, this Court had said:

> "Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the

> transportation of liquors into the State to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution" (p. 199).

If the power exerted by a state over interstate commerce under the Wilson Act is identical with the power exerted under the Webb-Kenyon Act, can it be contended that such power could be exercised in a manner different under the latter Act than it could be exercised under the former? True, it is that the extent to which the power might be exercised over articles in interstate commerce was enlarged, but the power remained the same.

In *Scott* v. *Donald,* 165 U. S. 58, this Court said that this power might not be exercised by a state in a manner by which commerce in liquors produced without the state were effectively discriminated against. This was not because the Wilson Act expressed that the power should be exercised "to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory." Such would have been the limitation of the law on the power in any event, and no expression of Congress was needed to make it so. Indeed, the Court made only passing reference to this provision of the Wilson Act, and placed its decision squarely upon the reasoning and authority of *Walling* v. *Michigan,* 116 U. S. 446, *Minnesota* v. *Barber,* 136 U. S. 313, and *Brimmer* v. *Rebman,* 138 U. S. 78, to which cases it devoted five pages of its opinion. It was as an aid to the enforcement of the police power of the state that both these Acts were passed by Congress. To extend their effect beyond this

purpose is unwarranted by the language employed or the conditions bringing about their enactment. If it is police power, and police power alone, that a state may exercise over intoxicating liquors while actually within the channels of interstate commerce or after introduction into the state by such means, then all that was said in *Scott* v. *Donald*, in expressing a limitation upon such power as permitted to be exercised by the Wilson Act, remains of equal force in its application to such power as permitted to be exercised by the Webb-Kenyon Act. In this case it was said:

> "The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the state cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful" (p. 100).

Such was the view of those courts having occasion to pass upon the question of the validity of state laws sought to be sustained by the provisions of the Webb-Kenyon Act during the short interval between the passage of the Webb-Kenyon Act and National Prohibition.

In Brennen v. *Southern Express Co.*, 106 So. Car. 102, 90 S. E. 402, it is said:

> "The first question to be decided is: Did the statute law of this state, as it stood at the date of the transactions alleged in the complaint, and at the time of the decision in the circuit court, which was before

the prohibition law became effective, violate the federal Constitution by making an unlawful discrimination against liquors shipped into the state in interstate commerce? That question must be answered in the affirmative. At that time the state recognized liquor as a legitimate article of commerce by engaging in the importation and sale of it for profit. And there was no limit to the quantity which a citizen who patronized the dispensaries might buy and keep in his possession for personal use, and no limit to the number of purchases that might be made within any specified time. *There was therefore clearly a discrimination made in favor of liquors bought from the dispensaries and of persons who patronized the dispensaries.* The point was squarely decided in *Scott* v. *Donald,* 165 U. S. 58, 101, 17 Sup. Ct. 265, 272 (41 L. Ed. 632), where the court said: 'It is sufficient for the present cases to hold, as we do, that when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in and importing them from other states; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting state as against similar products of the other states.'

"The act of Congress of March 1, 1913, known as the Webb-Kenyon Act, does not affect the decision of the question; for, while that act does divest intoxicating liquors shipped into a state in violation of its laws of their interstate character and withdraws from them the protection of interstate commerce, it evidently contemplated the violation of only valid state laws. It was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states which are recognized as subjects of

lawful commerce by the law of the state making such discriminations, nor the power to make unjust discriminations between its own citizens. Substantially the same thing was said in *Scott* v. *Donald* of the Wilson Act (Act Aug. 8, 1890, 26 Stat. 313, c. 728 [Comp. St. 1913, § 8738]), by which Congress made liquors shipped into a state subject to its laws after delivery thereof to the consignee. The principle there decided was reaffirmed in *Vance* v. *Vandercook,* 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100" (pp. 403, 404).

In *Evansville Brewing Ass'n* v. *Excise Commission,* (225 Fed. 204) the Court disposed of the contention that under the Webb-Kenyon Act a state is free to discriminate against liquors manufactured outside its jurisdiction in the following language:

"That the Wilson Act applies in favor of regulatory, as well as prohibitory, state legislation, and that state legislation that would be construed as an exercise of the revenue power of the state, when relating to a subject-matter other than intoxicating liquors, will be construed as an exercise of its police power, when it relates to intoxicating liquors, has been held, also, in the cases of *Vance* v. *Vandercook,* 170 U. S. 438, 42 L. ed. 1100, *Pabst Brewing Company* v. *Crenshaw,* 198 U. S. 17, 49 L. ed. 925, and *Reymann Brewing Co.* v. *Brister,* 179 U. S. 445, 45 L. ed. 269. Under these cases, and since the passage of the Wilson law and the Webb-Kenyon law, the State of Alabama has the power to exact a license from the Alabama seller of beer made in another state and shipped into this state, if the license is for police purposes and works no unjust discrimination against the foreign made beer" (p. 209).

Just how appellants make use of the *Clark Distilling Co.* case in support of their argument to sustain the California statute is not readily understood. Quotation is made from that case which is in entire harmony with the construction placed upon the act by appellees. There was no discrimination involved. That statute forbade the manufacture, transportation, and sale of intoxicating liquors in the state of West Virginia. It did not forbid the use of such liquors. Whether the liquors transported were manufactured within or without the state mattered not in the prohibition against transportation or sale. Whether the transportation was intrastate or interstate was immaterial under the act. Both were prohibited. No contention is made by appellees in this case that a state might not, under the Twenty-first Amendment, prohibit entirely all manufacture, sale, and transportation of intoxicating liquors, or that such prohibition would not apply to domestic liquors as well as liquors sought to be transported into the state, whether use was made unlawful or not.

To make this case applicable to their argument, appellants first set up for appellees a position never taken by them and which was not before the court on the trial of this case. They seek to state the appellees' position in advance by saying that the same line of reasoning was urged by plaintiff in the *Clark Distilling Company* case as is urged by the plaintiff below in this case and followed by the lower court, stating in substance that it is the position of appellees that where there is no prohibition against use or purchase of intoxicating liquors, there may be no state law prohibiting their importation. It is much easier for the State to meet such an assumed position than to meet the position that appellee has taken throughout this

case. If the West Virginia statute involved in the *Clark Distilling* case had permitted, with or without restriction, the manufacture, sale, and transportation of intoxicating liquors but had denied the importation of all liquors into the state, the situation presented by this case would have been before the court in that case. There being no element of discrimination, no difference of treatment between domestic and foreign liquors, the case is useful on this appeal only because it discloses the Court's view that the principles of the Webb-Kenyon Act are but an extension of the same principles involved in the Wilson Act, and that the state in the exercise of its power is restrained by the same limitations under the former that it was under the latter.

Whether the construction given the Webb-Kenyon Act in the *Clark Distilling* case refuted the construction given in the *Adams Express Company* case, as stated by the appellants in their brief (pp. 36-37), is material to no question on this appeal. The issue here is not whether a state may deny the importation of intoxicating liquor without also denying the personal use of such liquor. That was all that was before the Court in those cases.

Appellants argue that if any doubt remained as to the extent of the application of the Webb-Kenyon Act in removing the protection of the Commerce Clause from interstate shipments, it was removed by this Court in the opinion rendered in *McCormick & Co.* v. *Brown,* 286 U. S. 131, that case again has no pertinency to any question before the court on this appeal. While the act of the State of West Virginia involved in the case regulated the sales of products containing alcohol, all that was there decided was that the holder of a federal permit was not relieved from compliance with the law exacting a state permit. There was no want

of uniformity in the application of the law to domestic and foreign products. A non-resident in making his sales within the state was required to obtain the same permit that was required of a resident making like sales within the state. That a state has the power to require a license of one doing business in the state though that business be wholly through interstate commerce channels, no one will doubt.

While reference is made by appellants to *Seaboard Air Line Railway* v. *North Carolina,* 245 U. S. 298, they place no reliance upon that case in support of their argument. *Rainier Brewing Co.* v. *Great Northern P. S. S. Co.,* 259 U. S. 150, cited by appellants, involved no question of discrimination, the laws of the state applying equally to intrastate and interstate commerce.

Thus, though all the cases cited by appellants in support of their construction of this act are of historical interest, they are of no benefit in the solution of the problem before the Court on this appeal in the use which appellants seek to make of them.

The purpose of the Webb-Kenyon Act being as indicated in its title "An Act Divesting Intoxicating Liquors of Interstate Character in Certain Cases," the manner in which a state may exercise its power over articles within the state, but which have been introduced into the state through the channels of interstate commerce, should be no greater or less under this Act than it was before its passage.

It was to avoid use of the channels of interstate commerce for the purposes previously indicated, and to prevent the immunity which would attach to such articles while in commerce, that this Act was passed. When the articles have emerged from commerce, whether there ever was a condition of complete immunity from state power by reason

of their having been in interstate commerce in their introduction into the state, should be wholly immaterial in determining the extent to which a state may exercise its police power after they have become commingled with the mass of property within the state.

If a state could not, before the enactment of the Wilson Act, the Webb-Kenyon Act, or the Twenty-first Amendment, impose a discriminatory license fee upon one engaged in handling liquors produced without the state, how does the power of the state, under the Wilson and the Webb-Kenyon Acts, enable a state to so discriminate after their passage?

Under the Webb-Kenyon Act and the Twenty-first Amendment, a state is enabled to exercise the same power in respect to liquors wholly within the channels of interstate commerce, that it could, before such Act and amendment, have exercised over such liquors only after they had moved out of such channels. The power is the same. The field of its exercise has simply been enlarged.

f. Appellants' argument based upon history of the adoption of the Twenty-First Amendment.

It is argued by appellants (p. 42) that it was the intention of Congress in proposing this Amendment to the States, "to restore to the several States their full sovereignty in the control and handling of the liquor problem." In support of such contention appellants select a few statements of members of the Senate made in the debate upon this proposal. The language selected is removed entirely from the language which precedes and which follows, and thus fails to disclose the subjects which were being discussed and the meaning which was intended by its use.

Appellees have set out more fully, in the Appendix to this argument, the statements made in connection with the quoted excerpts, and, from the entire debate, it is made to appear that what is now relied upon by appellants in support of their argument was said in reference to a subject having no relation to the purposes for which the language is now sought to be used.

From these debates it will appear that the language of Senator Blaine, quoted in the appellants' argument, was used in reference to the preservation of the right of a state to declare its own policy in reference to the regulation or prohibition of intoxicating liquors under its police power. The language of Senator Glass related to a subject entirely foreign to anything that would now throw any light upon the meaning of the Twenty-first Amendment. It related to an entirely different proposal, covering a guaranty against the return of the saloon, as expressed by him:

> "All I want is a constitutional guaranty against a return of this abominable saloon system of dispensing intoxicating liquors—that is all—and if we write it into the Constitution I assume that no State would ever even undertake to violate the text of the Constitution by licensing a saloon." (Vol. 76, Congressional Record, p. 4220.)

The controversy which arose on the debate of this proposal that related, not to whether a state should be free to impose restrictions or prohibitions of its choice upon liquors transported within its borders, but to whether the National Government should be retained in the enforcement field of prohibition. What was said in the debates in this connection must have reference to this subject. It can have reference to no other subject.

The language of Senator Glass:

> "So I have met the objection that we are undertaking to interfere with interstate commerce as between states which authorize the manufacture, transportation, and sale of liquors"

was not used in connection with any argument by him that the language of his proposal would in any way limit the power of a state over interstate commerce in liquors that was not in a like way limited by the proposal ultimately adopted and then pending before the Senate.

It is the contention of appellants that in the debates Senator Glass, by his proposed Amendment, was attempting to limit the power of the state over intoxicating liquor in interstate commerce in a way in which it was not limited by the proposal subsequently adopted; whereas, the fact is the proposal of Senator Glass, as stated by him, was not only to prohibit the shipment of liquor into dry states, but to prohibit the saloon as well. This is evidenced by the reply of Senator Glass to the inquiry of Senator Reed as to whether he (Senator Glass) would favor the striking from his proposal of the provisions relating to the concurrent power of the Federal Government in the enforcement of state prohibition, Senator Glass saying:

> "That being so, I should be perfectly willing to eliminate that one sentence from the measure. All I want is a constitutional guaranty against the return of this abominable saloon system of dispensing intoxicating liquors—that is all."

These debates yield no other light than that the Amendment proposal, then pending before Congress, was designed to guarantee the freedom of a state in the exer-

cise of its police powers upon liquors coming within its borders in interstate commerce. Both parties had pledged in their preceding campaign (1st) the repeal of the Eighteenth Amendment, and (2nd) a Constitutional guaranty that the states would have the right to pursue a policy of complete prohibition or regulation which could not be defeated by the repeal of the then effective Congressional Acts.

While the debates in the Senate upon the proposed amendment may not be resorted to as an aid to the construction of the meaning of that amendment, adopted not by the Senate but by the states themselves, yet, when those debates are examined, not even a suggestion is revealed that the purpose of such amendment was to enable the states to adopt a policy which would entirely prohibit interstate commerce in liquors while freely permitting intrastate commerce therein.

The criteria for determining the meaning of the language employed in this amendment is stated by the Court in *Maxwell* v. *Dow* (176 U. S. 581, 601):

> "What speeches were made by other Senators, and by Representatives in the House, upon this subject is not stated by counsel nor does he state what construction was given to it, if any, by other Members of Congress. It is clear that what is said in Congress upon such occasion may, or may not, express the views of the majority of those who favor the adoption of the measure which may be before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used and not by the speeches made regarding it.

What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed Constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the Members voted in adopting it. *United States* v. *Trans. Missouri Freight Association,* 166 U. S. 290, 318; *Dunlap* v. *United States,* 173 U. S. 65, 75.

In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three-fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expression, in a way so far as is reasonably possible, to forward the known purpose of object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit."

POINT III

THE TWENTY-FIRST AMENDMENT DOES NOT REMOVE STATE LIQUOR LEGISLATION FROM THE OPERATION OF THE ESTABLISHED PRINCIPLE THAT MATTERS WHICH ARE ADMITTEDLY WITHIN THE SPHERE OF STATE POWER MAY NEVERTHELESS NOT BE SO REGULATED AS TO DISCRIMINATE AGAINST THE PRODUCTS OF OTHER STATES AND THEIR MANUFACTURERS AND DEALERS, AND THE ACT IS THEREFORE INVALID.

The effect of the Amendment was, like that of the Webb-Kenyon Act, to subject intoxicating liquor to the police power of the state upon its arrival therein. For this purpose it may be subjected to any legitimate exercise of the police power. Unless, however, the effect of the Amendment was to remove all limitations upon its exercise to be found in other sections of the Constitution, including the Commerce Clause, the mere fact that the state shall have legislated upon the subject is not enough. The validity of its legislation must still be tested by those principles governing the exercise of the state's power in respect of articles of interstate commerce which have become subjected to the police power, and of regulation of dealers therein. But for the Amendment, the police power would not attach until sale in the original package. By reason of the Amendment it attaches upon arrival within the State, but the time when it attaches throws no light upon the validity of the Act.

1. The states may not under the Webb-Kenyon Act and the Twenty-first Amendment exercise their police power so as to discriminate against the products of other states.

a. DECISIONS OF THIS COURT INVOLVING STATE LIQUOR LEGISLATION.

The question is not when the police power or other powers of the state attach, but what constitutes a valid exercise of them. This is made plain by the cases hereinbefore cited, and particularly by the decision in *Scott* v. *Donald, supra,* 165 U. S. 58. In that case the Court held that the Wilson Act had not so far removed the restrictions upon the police power arising from the Commerce Clause as to permit a state to discriminate in favor of liquor of home manufacture and against liquor from the outside. The question went to the scope of the police power as restrained by other provisions of the Constitution, not to the time at which it attached. This case has never been overruled. There is nothing in the history of succeeding Acts, of the Twenty-first Amendment, or the opinions of this Court, to warrant the suggestion that it is not equally applicable to an attempted exercise of the police power under color of the protection of the Twenty-first Amendment. There is no difference in principle between discriminating against foreign-made liquor through complete prohibition, while permitting sale of domestic liquor, and discriminating against the latter through the exaction of a tax imposed upon the sellers thereof, not imposed upon the sellers of domestic liquor.

A state may prohibit the manufacture of liquor from any source of supply. When it does so there is little room for the application of the principle now under discussion. It was not involved in the *Clark Distilling* case, upon which appellants place so much reliance. That case related to the liquor legislation of a bone dry state. The Act in question prohibited transportation and delivery by a common carrier within the state of all liquor, whether moving in interstate or intrastate commerce. The Court held this Act to be good as an exercise of the police power in aid of the enforcement of its liquor policy and laws. No discrimination was involved, but if the law of West Virginia, reviewed in that case, had forbade the transportation and delivery within the state of all liquor coming from the outside, but permitted such transportation and delivery of liquor produced within the state, is it conceivable that the Court would have sustained the Act as being one within the reach of the Webb-Kenyon law? Certainly not.

The West Virginia statute involved in the *Clark Distilling* case also made an exception in favor of both the transportation, use, and sale of grain alcohol by druggists. This exception applied equally to grain alcohol of home origin and of foreign origin. If, while permitting the sale of grain alcohol of domestic origin, under the conditions imposed, it had prohibited the transportation, delivery or sale of grain alcohol of foreign origin, or had imposed a higher license fee upon a druggist selling the latter, as compared with one selling the former, is it conceivable that such discrimination would have been held to be within the police power of the state? We think not. Under the Webb-Kenyon Act, as under the Twenty-first Amendment, such grain alcohol of foreign production

would be subject to the police power of the state upon its arrival therein, but this would not make it so immune from the limitations imposed by the Commerce Clause upon the exercise of the police power as to permit of such discrimination.

A state may prohibit the sale of alcoholic beverages altogether, but when it permits them it may not impose one set of conditions for the sale of liquors of domestic origin and another and more onerous set of conditions for the sale of liquors produced outside the state. This is not a legitimate exercise of the police power but a statute directly burdening and interfering with interstate commerce in respects not removed from the operation of the Commerce Clause either by the Webb-Kenyon Act or by the Amendment.

Neither the Webb-Kenyon Act nor the Amendment applies only to states which are wholly dry. It applies equally to those which permit the sale of intoxicating liquors, in the sense that in either case liquor from outside the state becomes subject to the police power upon its arrival therein. It is plain, however, that while the effect is to subject liquors from outside the state to the exercise of the police power at the same time in both cases, that may well be a valid exercise of the police power when imposed by a dry state which would not be when imposed by a state permitting the sale of such liquor within its borders. Nor is the question one of degree. Where sale is permitted, the conditions imposed therefor must be the same as applied to all liquor, irrespective of its origin, otherwise the Act is not a legitimate exercise of the police power but an invasion of the rights of other states to send their goods into another for sale there upon conditions no more onerous than those imposed in the state of receipt.

In the exercise of its power to regulate the liquor traffic within its borders, the state is free to make any provision reasonably appropriate for its regulation. It may require a carrier to keep records of all deliveries, whether of liquor from within the State or without. *Seaboard Air Line Railway* v. *North Carolina,* 245 U. S. 298. It may require reports. It may subject to visitation all persons engaged in the business, to inspection, as well as require inspection of the liquor itself, and impose any other regulation, the purpose of which is to enforce obedience to the law and prevent its evasion by subterfuge, and is reasonably adapted to these ends. *Turner* v. *Maryland,* 107 U. S. 38. It may not impose higher license fees or more onerous conditions upon the sale of liquor brought in from outside the State than that manufactured within it. Such a provision is not a legitimate exercise of the police power but a discriminatory burden and restriction upon and interference with interstate commerce. The Court so held in *Walling* v. *Michigan,* 116 U. S. 446. In that case a Michigan statute, which fixed a license fee for one engaged in the handling of foreign liquors greater than was imposed upon a dealer in domestic liquors, was held to be invalid and repugnant to the Commerce Clause of the Constitution. No protection being claimed by reason of the articles being employed in actual interstate commerce, the power of the state in the one situation should extend no further than in the other.

Of course, it will not do to cite decisions of this Court relating to intoxicating liquors which were rendered prior to the enactment of the Webb-Kenyon Act in support of a position taken in respect to the limitations upon state power after the enactment of that Act unless such decisions are cited with an understanding as to the limitations upon their

present effect. But when the sole question is whether the police power of the state may be exercised in a discriminatory manner upon liquors wholly without the channels of interstate commerce, how can the situation be said to differ before or after the passage of these Congressional Acts?

Under the present state of the law, intoxicating liquor is divested of its immunity as an article of interstate commerce by virtue of the Twenty-first Amendment. The case of *Walling* v. *Michigan* involved intoxicating liquor which it was conceded was subject to the exercise of the state's police power and immune from that special protection against state regulation which the Commerce Clause is deemed to bestow on transactions which are themselves part of interstate commerce.[1] It would appear, therefore, that the relative positions are identical, that case and this both involving liquor beyond the immunity afforded it while actually in the channels of interstate commerce. Upon this theory do the cases of *Walling* v. *Michigan,* 116 U. S.

---

[1]The particular transaction involved in the *Walling* case was the solicitation of an order for beer to be shipped in from another state. At the date of this decision, however, such a transaction was not protected by the doctrine, later established by *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489 (1887), and recently reasserted by this Court in *Real Silk Hosiery Mills* v. *Portland,* 268 U. S. 325 (1925), that a state may not tax, even in a non-discriminatory manner, the soliciting of orders for goods to be shipped from outside the state. Neither was the transaction protected by the doctrine, established in *Leisy* v. *Hardin,* 135 U. S. 100 (1890), and confined to actual prohibition of sales in the original package in the more recent case of *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506 (1923), by which doctrine sales in the original package were protected from even non-discriminatory state regulation. Under this state of the law, therefore, the Court in the *Walling* case was faced, as is this Court in the present case, with the question of the effect of the Commerce Clause upon transactions admittedly subject to the exercise of the police power of the state.

446, and *Tiernan* v. *Rinker,* 102 U. S. 123, become authorities applicable to the law upon the questions involved. The only exception to this is in the case of liquors moving through the state in interstate commerce, concerning which this argument has no application.

In the case of *Walling* v. *Michigan,* this Court said:

> "The single question, now before us for consideration is, whether the statute of 1875 is repugnant to the Constitution of the United States. Taken by itself, and without having reference to the Act of 1881, it is very difficult to find a plausible reason for holding that it is not repugnant to the Constitution. It certainly does impose a tax or duty on persons who, not having their principal place of business within the State, engage in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the State. If this is not a discriminating tax levelled against persons for selling goods brought into the State from other States or countries, it is difficult to conceive of a tax that would be discriminating. It is clearly within the decision of *Welton* v. *Missouri,* 91 U. S. 275, where we held a law of the State of Missouri to be void which laid a peddler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares, or merchandise, not the growth, product, or manufacture of that State, and which did not lay a like tax upon the sale of similar articles, the growth, product or manufacture of Missouri. The same principle is announced in *Hinson* v. *Lott,* 8 Wall. 148; *Ward* v. *Maryland,* 12 Wall. 418; *Guy* v. *Baltimore,* 100 U. S. 434, 438; *County of Mobile* v. *Kimball,* 102 U. S. 691, 697; *Webber* v. *Virginia,* 103 U. S. 344. A discriminating tax

imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States. * * *

"Many state decisions might also be cited in which the same doctrine is announced. Thus, in the case of *Higgins* v. *300 Casks of Lime,* 130 Mass. 1, 3, it is said: 'The result of all the decisions is, that the several states have no authority to prescribe different regulations in relation to the commerce in certain articles, dependent upon the states from which they are brought. This rule in no manner controls or limits the power of a State to enact appropriate health or inspection laws; for such laws are necessarily uniform, and are not dependent upon place.'" (pp. 454, 457).

In *Tiernan* v. *Rinker,* 102 U. S. 123, a Texas statute imposing a tax upon the sale of beer of foreign manufacture, but imposing no tax upon the sale of domestic beer, was held invalid even as applied to persons who were engaged in the retail sale of beer in quantities of less than one quart. The Court said:

"According to it [the doctrine of *Welton* v. *Missouri,* 91 U. S. 275], the statute of Texas is inoperative, so far as it makes a discrimination against wines and beer imported from other States, when sold separately from other liquors. A tax cannot be exacted for the sale of beer and wines when a [*sic*] foreign manufacture, if not exacted from their sale when of home manufacture" (p. 127).

b. Decisions of lower Federal courts.

Appellants in argument refer to six decisions of statutory three-judge courts, said to have passed upon the questions arising in this case since the adoption of the Twenty-first Amendment. Those cases are of value to this Court only insofar as they commend themselves on the strength of the reasoning employed. For such purpose, each case is analyzed in Appendix R (p. lix) to this brief with so much of the language set forth as is expressive of the views announced. It may be said that but one decided case, that of *Premier-Pabst Sales Company* v. *Grosscup*, 12 Fed. Supp. 970 (from which appeal was taken to this Court but which this Court disposed of without finding it necessary to pass upon the constitutional questions decided by the trial court), was determined adversely to the position of appellees herein, while the language of the courts and the decisions rendered in the cases of *Pacific Fruit and Produce Company* v. *Martin* (not yet officially reported), *Joseph Triner Corporation* v. *Arundel*, 11 Fed. Supp. 145, the concurring opinion of Circuit Judge Farris in *General Sales & Liquor Company* v. *Becker*, 14 Fed. Supp. 348, and the opinion below in this case, all reach conclusions sustaining the positions of appellees here taken.

c. Applicability of decisions of this Court forbidding dicrimination against foreign products other than liquor.

The very purpose of the Act, being to put articles while in interstate commerce in the position of articles which have

lost their immunity by coming to rest after commerce, should result in a construction which would permit the exercise of state power only to the same extent that it might have been exercised if the articles had been removed from commerce itself. This being true, the decisions of this Court holding invalid state laws which attempted to discriminatorily affect articles concededly subject to the exercise of the state's police power should apply with equal force when a state attempts to enact laws discriminatorily affecting intoxicating liquor in interstate commerce. Though milk shipped from Vermont to New York is subject to the full exercise of the police powers of the state after its emergence from interstate commerce, yet it may still be protected by the Commerce Clause of the Constitution if the State of New York attempts to direct discriminatory legislation against it because of its origin from the State of Vermont. *Baldwin* v. *Seelig,* 294 U. S. 511.

If the State of Tennessee attempts to impose a tax upon logs cut from the soil of other states, even though the logs have passed outside the channels of interstate commerce and are, as a part of the general mass of property of the state, subject to the laws thereof, the Commerce Clause of the Constitution nevertheless may be resorted to as a protection against the imposition of such a discriminatory tax. *Darnell* v. *Memphis,* 208 U. S. 113.

Appellants criticize the reliance of the trial court, in its opinion below, upon the cases of *Darnell & Son* v. *Memphis,* 208 U. S. 113, *Guy* v. *Maryland,* 100 U. S. 434, *Webber* v. *Virginia,* 103 U. S. 344, *Walling* v. *Michigan,* 116 U. S. 446, and *Baldwin* v. *Seelig,* 294 U. S. 511, and, as if to demonstrate that such cases have no application to the principles involved in this case, say that the *Darnell* case

relates to logs, the *Guy* case to potatoes, the *Webber* case to sewing machines, the *Baldwin* case to milk, and that the *Walling* case, although relating to liquor, was decided before the Wilson and the Webb-Kenyon Acts.

To attempt a distinction upon this ground merely fails to recognize the purpose for which the cases are used in support of the opinion. The fact that in the cited cases the court was dealing with a statute regulating milk, taxing logs, or taxing potatoes, and in this case with a statute regulating intoxicating liquor, would be a very ready distinction to avoid their application here if the power exercised by the state bore any reasonable relation to the subject-matter of the regulation. However, if, as is contended by appellees, the only power of a state over intoxicating liquor in interstate commerce is its power to enact police regulations, to promote the objects for which such power may be properly exercised, then it matters not whether the subject-matter be intoxicating liquor or milk. If it may be claimed for those subjects, entirely out of interstate commerce channels, the protection of the commerce clause, such cases should become of equal application whether the subject of regulation be intoxicating liquor or milk. In other words, if the police power of a state may not, as held in *Baldwin* v. *Seelig,* be availed of by a state to secure advantages for its domestic products, it should matter not whether such police power was sought to be so availed of upon the subject of milk or intoxicating liquor.

Certainly there is no more reason for saying that the discouragement of commercial intercourse in intoxicating liquor is a valid exercise of the police power when by so doing the state is seeking to encourage the traffic in its own domestic liquors. It is, of course, within the proper realm

of police power for a state to discourage traffic in intoxicating liquor, but it is not within the objects of police power for a state to discourage only interstate traffic in such liquors to the advantage of intrastate traffic.

This Court, in expressing its views and holding invalid legislation of the State of New York in restricting the sale of milk produced in another state, uses the very illustration presented in this case to demonstrate such legislation to be invalid. This is the language of this Court in the *Baldwin* v. *Seelig* case upon the question presented by this appeal:

> "In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin. What it does is no more than to apply its domestic policy, rooted in its conceptions of morality and order, to property which for such a purpose may fairly be deemed to have passed out of commerce and to be commingled in an absorbing mass" (p. 528).

Further discussing the limitations upon the exercise of state police power, it is said:

> "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what

> is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. The form of the packages in such circumstances is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended" (p. 527).

It must be clearly kept in mind that this Court, in the foregoing cases, was dealing with a subject entirely out of the channels of interstate commerce, and thus as much subject to regulation under the police powers of the State as are intoxicating liquors in the channels of interstate commerce. The only difference between intoxicating liquors and other articles of commerce is that the former are interrupted in their interstate journey at the border of the state of destination and, by the Congressional Acts and the Twenty-first Amendment, are divested of their interstate commerce immunity, while that immunity persists with the latter until its interstate journey is at an end.

The state may in the exercise of its police powers enact inspection or quarantine laws regardless of the interstate character of the commerce to which they apply. *Foster* v. *Master and Wardens of The Port of New Orleans,* 94 U. S. 246; *Turner* v. *Maryland,* 107 U. S. 38; *Smith* v. *St. Louis, etc. Ry. Co.,* 181 U. S. 248. The police power for these purposes attaches to the subject matter at the very moment it reaches the border of the state, yet the restraint of the commerce clause is such as to forbid the exercise of this power in a manner which discriminates against the products of other states in favor of products of domestic origin.

Voight v. *Wright,* 141 U. S. 62; *Minnesota* v. *Barber,* 136 U. S. 313, *Brimmer* v. *Rebman,* 138 U. S. 78; *Vance* v. *Vandercook Co.,* 170 U. S. 438; *Foote & Co.* v. *Stanley,* 232 U. S. 494; *Standard Oil Co.* v. *Graves,* 249 U. S. 389; *Texas Co.* v. *Brown,* 258 U. S. 466; *Bethlehem Motors Corp.* v. *Flynt,* 256 U. S. 421; *cf. Hannibal & St. Jos. R. Co.* v. *Husen,* 95 U. S. 465. Thus, for example, in *Voight* v. *Wright, supra,* it was held that a Virginia statute which required the inspection of flour from other states was invalid because it required no inspection of domestic flour. The enactment of legislation providing for the inspection or quarantine of articles in interstate commerce is as clearly within the police powers of the state as is the enactment of legislation concerning intoxicating liquors; if in the former of these situations the power of the state does not extend to the enactment of legislation discriminating against products of other states, it clearly should not in the latter.

d. CONCLUSION AS TO THE POWER OF STATES TO DISCRIMINATE AGAINST PRODUCTS OF OTHER STATES.

Certain it is that the Twenty-first Amendment prohibits the introduction into a state of intoxicating liquors in violation of the laws thereof, but equally certain it is that a statute of a state is not to be accepted as the law of that state if in its passage the legislature exceeds the limitations upon its power as expressed in the Federal Constitution. The question is not: It there a statute of the state which purports to prohibit the introduction of such liquors into the state? The question is: Is such statute the law of the state?

If that statute by its terms selects as the object to be affected liquors manufactured outside the state, and seeks to direct that effect in a way which will embarrass or prohibit introduction into the state to the advantage of like liquors produced within the state, the question as to whether it is a law of the state is answered by the cases of *Scott* v. *Donald, Vance* v. *Vandercook,* and *Baldwin* v. *Seelig,* as well as the other authorities cited herein.

Again, let the position of appellees be not misunderstood: No protection of interstate commerce is asserted against the exercise of valid police regulations over the subject of intoxicating liquors. The state is as free to deal with such subjects in interstate channels as it is to deal with subjects originating within its borders, so long as it applies its regulations uniformly and without discrimination. The constitutional limitation here asserted by appellees against state action is not to secure favor for products in interstate commerce, or introduced into the state through such channels, (a favor that would otherwise attach to articles of interstate commerce) but to secure treatment of such articles uniform with treatment of like articles produced within the state. This construction of the Twenty-first Amendment is consonant with every purpose for which it was adopted, and this construction alone harmonizes the Twenty-first Amendment with Article I, Section 8, Clause 3.

If by any construction the two constitutional provisions can stand together, that is the construction that should be given by the Court. This principle is expressed by this Court in *Prout* v. *Starr,* 188 U. S. 537, as follows:

> "The Constitution of the United States, with the several amendments thereof, must be regarded as

> one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance, or confederation, from passing any bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war,—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations" (p. 543).

The Federal Government having its origin in the necessities of commerce, and that purpose alone being recognized by all who have spoken with authority on the subject as the one outstanding purpose in the minds of the framers of the Constitution, any contention that the state is supreme in the field of commerce should be given support only because no other construction could fairly be given the amendment. As was said by Daniel Webster whose language is quoted by this Court in *Guy* v. *Maryland,* 100 U. S. 434:

> "Over whatever other interests of the country this government may diffuse its benefits and blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessi-

ties of commerce; and for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system."

The construction contended for by appellees gives to the state every shield in the protection of its own policy that it ever demanded in the history of its struggle for relief against the evils of the liquor traffic. It prevents a state from doing that which it now seeks to do, of converting the shield into the sword. The use of its power as a sword is thus out of harmony with the genesis of our government. Against such construction is the contention of the appellants in this case, that the state is sovereign within its domain in dealing with intoxicating liquors and may not be restricted in the exercise of its power by anything contained in any of the provisions of the National Constitution.

Is a construction to be given this Amendment which would permit the state of California

1. To enact a law by the terms of which the shipment of all liquor into the state is prohibited, while permitting freely the manufacture and sale of liquor within its borders.

2. To permit the importation of liquor from every state in the Union save one which is prohibited.

3. To permit the importation of intoxicating liquors from the State of Kentucky alone, but condition the right of such importation upon the State of Kentucky passing an Act permitting the importation exclusively within that state of the wines of California.

4. To prohibit all importation of intoxicating liquors except those imported from Germany but condition the right

of importation of such liquors so long only as Germany admits the products of the State of California into that Nation without duty or impost.

5. To permit the importation of liquor manufactured by one concern to the exclusion of the liquor manufactured by every other concern in the United States.

6. To restrict the importation of liquor in interstate commerce to one railroad to the exclusion of all other carriers.

7. To limit the importation to such as may be made in a certain make of automobile or truck to the exclusion of any other means of conveyance.

Although the foregoing examples may appear to illustrate the extreme situation which may arise upon the appellants' construction of the amendment, yet, if, as appellants contend, the state is restrained by no provision of the National Constitution in exercising its powers over this subject, the assumed situations may readily become realities.

Laws of the several states and bills introduced in the legislature which are set out in the Appendix to this Argument are but suggestive of the form which state legislation will take should a construction such as appellants contend for prevail. Amid this commercial conflict between states, the language of the court in *State* v. *North,* 27 Mo. 464, cited with approval by this Court in *Walling* v. *Michigan,* 116 U. S. 446, resounds with prophetic vision:

> "From the foregoing statement of the law and facts of this case it will be seen that it presents the question of the power of the states, in the exercise of the right of taxation, to discriminate between products of this State and those manufactured in

our sister states. * * * But, whatever may be the motive for the tax, whether revenue, restriction, retaliation or protection of domestic manufacturers, it is equally a regulation of commerce, and in effect an exercise of the power of laying duties on imports, and its exercise by the states is entirely at war with the spirit of the Constitution, and would render vain and nugatory the power granted to Congress in relation to those subjects. Can any power more destructive to the union and harmony of the states be exercised than that of imposing discriminating taxes or duties on imports from other states? Whatever may be the motive for such taxes, they can not fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures regardless of the consequences" (pp. 457, 458).

2. The discriminatory effect of the California tax is not cured by the tax upon domestic manufacturers.

While it is appellants' primary contention that the Twenty-first Amendment entirely removes the protection of the Commerce Clause from liquor, they nevertheless also contend that the tax in question does not discriminate against beer from outside the state. Appellants do not deny, as they could not, that although the importer's tax is in name upon a different class of persons than the wholesaler's tax, it is in effect a tax imposed upon the privilege of selling foreign beers within the state at wholesale. Appellants do not deny that whereas the California Act imposes a tax of only $50 upon the privilege of selling domestic beer at wholesale, it in effect imposes a tax of eleven times that

amount upon the privilege of selling foreign beer at wholesale. On the contrary, appellants argue that nevertheless the tax upon importers of beers does not discriminate against foreign beer because, of the two "fountain heads" of beer within the state, the manufacturer and the importer, both are taxed.

The error of this argument is, in its simplest terms, that it compares the California tax upon the manufacturing and selling at wholesale of domestic beer with the California tax upon the selling at wholesale, alone, of foreign beer.

Without considering the absurdities to which such a test for an existence of discrimination would lead, and without considering decisions of this Court which compel the rejection of such a test, it is evident that appellants' argument overlooks the real nature of the taxes imposed by the California Act. These taxes are not taxes upon beer. They are taxes upon engaging in certain aspects of the beer business. The several different aspects of the beer business recognized by the California Act itself are beer manufacturing, beer importing, beer bottling, beer wholesaling, and beer retailing. Of course, beer importing is not in itself a classification of a separate business transaction in beer. It is rather a term used to indicate that a business transaction which may involve either domestic or foreign beer has in the particular case under question involved foreign beer. Thus, the California Act defines "importer" to mean the first person "in possession" within the state of beer brought in from outside. (Jurisdictional Statement, p. 8; Appendix, p. iii). Such a person may be either the agent of a foreign manufacturer for selling his beer at wholesale in California or an independent

wholesaler of beer manufactured outside of the state. The same business function, as to domestic beer, is performed either by one who acts as an agent for a domestic manufacturer for selling his beer at wholesale or by an independent wholesaler of domestic beer.

Looking at the nature of the beer business, therefore, it appears that there are, as recognized by the California Act, three distinct aspects of the beer business, manufacture (which includes bottling), selling at wholesale, and retailing, importing being only a name for the buying side of the wholesaler's business when he is dealing in foreign rather than domestic beer. Of the three steps, manufacturing, wholesaling and retailing, only wholesaling and retailing are as to both domestic and foreign beers within the jurisdiction of California to tax. It is hence necessary in determining whether the taxes imposed discriminate against transactions in foreign beer, to compare the amount of tax imposed upon domestic beer on the one hand and upon foreign beer on the other hand, as to those aspects of the business the privilege of engaging in which California may tax. No objection is here made to the retailing taxes, but it is apparent that to impose upon the selling at wholesale of foreign beer a tax eleven times the amount of the tax imposed upon the selling at wholesale of domestic beer constitutes a serious discrimination against foreign beer.

It is not appellees' position that the result of this tax would be to permit the domestic manufacturer or the wholesaler of domestic beer to make larger net profits than the foreign manufacturer or the wholesaler of foreign beer. Whether domestic or foreign beer will command a greater part of the market or whether the greater net margin of profit can be made from handling domestic or foreign beer

is, of course, not here in question. That will depend upon a great variety of factors which enter into the cost of manufacturing and marketing the different products and which affect the price at which they are sold. It is of no use, as the appellants seek to do, to show that a greater tax cost (so far as *California* taxes are concerned) in the selling at wholesale of foreign beers, is compensated for by a greater tax cost in the manufacture of domestic beers. California, as to domestic and foreign beers, has the power to affect only a limited part of the total costs involved in the entire process through which beer passes from manufacture to consumption. In so far as, as to that part, California gives preference to domestic beers as against foreign beers, it clearly discriminates against those foreign beers.

The appellants' argument is not only theoretically and practically unsound, as applied to this situation, but the inevitable consequences of their argument lead to such absurdities as to compel its rejection. If, as appellants contend, California has the power to equalize the tax burden upon domestic and foreign beers, it should obviously be required or at least permitted to take into consideration the amount of tax burdens imposed upon foreign beers at the place of manufacture. The amount of these taxes might differ in each of the forty-eight different states. Appellants' theory, therefore, might require that forty-eight different rates be prescribed for importers of foreign beers, one to apply to the importer of beer from each state. California beer likewise competes with beer from other countries, and it might become necessary for California to impose a larger importer's tax upon German beer than upon beer made in other countries because Germany has favored its brewers by exempting them from taxation.

Moreover, if the appellants' approach is to be accepted, there is no reason why California should be limited to equalizing tax burdens. It should likewise be permitted to equalize all burdens. It should take into consideration the varying costs of transportation to California, the varying costs of production in the different states, and thus assure that its taxes are so imposed as to enable domestic manufacturers of beer to make the same profit, or to offer their beer for sale at the same price, as foreign manufacturers, wherever located.

The argument on this point is, of course, one as to facts, the issue being simply whether, as a matter of fact, the tax imposed gives an "advantage to the product manufactured in [California], and to the manufacturers and dealers of that state". This was the test applied in *Walling* v. *Michigan,* 116 U. S. 446. That case is not only authority that a state may not discriminate against the products of other states, but in its facts is a close parallel to this case. That case involved a Michigan statute of 1875, which imposed a tax of $300 upon persons from out of the state who should sell or solicit the sale of liquors to be shipped into the state from places without it, but did not impose a similar tax upon persons selling or soliciting the sale of liquors manufactured in the state. This statute as applied to one who had solicited a sale of liquor to be shipped into the state from outside, was attacked upon the ground that it discriminated against interstate commerce.[1] The defense was raised that the discrimination was cured by another tax imposed by an act of 1881 of $500 upon manufacturers of liquor within the state. The defense was rejected. The court said:

---

[1]See note, p. 62, *ante.*

> "Of course the act of 1875 does not assume to tax non-resident persons or firms for doing business in another State. They are subject to taxation in the States where they are located. It is the business of selling for such non-resident parties, or soliciting orders for them for sale in Michigan of liquors imported into the State, that is the object of taxation under the law; and any person engaged in those employments, or either of them, is subject to the tax of three hundred dollars per annum. Now, is such a tax or any tax imposed upon those who are engaged in the like employment for persons or firms located in Michigan, selling or soliciting orders for the sale of liquors manufactured in that State? Clearly not. * * * The tax imposed by the act of 1875 is not imposed on the same class of persons as is the tax imposed by the Act of 1881. That this must give an immense advantage to the product manufactured in Michigan, and to the manufacturers and dealers of that State, is perfectly manifest" (p. 459).

If appellants' argument is sound, then if California did not impose a tax upon importers, it would thereby discriminate against its own manufacturers. This was precisely the situation presented and the argument made to this court in *Brown-Forman Co. v. Kentucky,* 217 U. S. 563. That case involved a Kentucky statute which imposed an occupational tax upon persons engaged in the state in compounding, rectifying, adulterating or blending distilled spirits. The defendant, who was engaged in Kentucky in that business, had refused to pay the tax because, as he contended, there was no similar or compensating tax imposed upon liquor of foreign origin, and, therefore, as he contended, the state tax discriminated

in favor of interstate commerce, in violation of both the Commerce Clause and the Fourteenth Amendment. In rejecting this contention, the court said, at page 576:

> "Here the exaction is not upon the product at all, but upon the business of producing the product in the State. The same business carried on beyond the State could not have been subjected to a like tax. There has therefore been no arbitrary or capricious discrimination against the resident rectifier."

Appellants rely upon *Reymann Brewing Company* v. *Brister,* 179 U. S. 445. That case simply held that an excise tax upon all wholesalers within the state was not invalid because manufacturers within the state were allowed to sell at their plant in quantities of more than one gallon without paying a tax upon such sales. The very feature of that case which the court upheld would exist as to the California Act if the tax on importers were eliminated. The California Act would then, like the act in question in the *Reymann* case, require wholesalers, both within and without the state, to pay an equal tax but would permit the manufacturer to sell without the payment of any tax upon the privilege of selling, as distinguished from manufacturing. The *Reymann* case, therefore, presented the very situation which appellees claim should exist in California.

The problem here being considered is whether the California taxing scheme has the practical effect of discriminating between distributors who sell beer made within the state and those who sell imported beer. An identical taxing scheme of the state of Pennsylvania was characterized by this Court at its last term as so discriminating. *Premier-*

Pabst Sales Company v. *Grosscup,* No. 745.—October Term, 1935 (Decided May 18, 1936). The Pennsylvania statute there attacked imposed the following license fees on persons engaged in the named aspect of the beer business:

> "(a) In the case of a manufacturer, the license fee shall be one thousand ($1,000.00) dollars for each place of manufacture, and shall be paid to the board.
>
> (b) In the case of a distributor, the license fee shall be four hundred ($400.00) dollars, and shall be paid to the board.
>
> (c) In the case of an importing distributor, the license fee shall be nine hundred ($900.00) dollars, and shall be paid to the board."

It is seen that under that act, as under the California act, distributors (elsewhere defined as persons selling not for consumption on the premises where sold) of both domestic and foreign beer were required to pay a license fee, but a $500 larger fee was imposed upon a distributor who also imported than was imposed upon a distributor who did not import. And under the Pennsylvania statute as under the California act, a still larger license fee was imposed upon the manufacturer than upon the importing distributor. The Pennsylvania statute was attacked in this Court upon the same ground now urged against the California act. The Court did not consider the constitutional question because it appeared that plaintiff was without standing to present it, since he held no valid license and no license could be legally issued to him. The Court, nevertheless, in its statement of the facts of the case, said:

> "Premier-Pabst Sales Company, a Delaware corporation, is a distributor of beer made in Illinois and Wisconsin. Having secured a license issued under a statute of Pennsylvania enacted and amended in 1933, it engaged in business there. That statute was again amended by Act No. 398, approved July 18, 1935, which changed the licensing law *so as to discriminate between distributors who sold beer made within the State and those who sold imported beer.* The annual license fee of the former was made $400, and the penalty of the bond required of them was set at $1,000; the license fee of the latter was made $900, and the penalty of the bond to be given by them was set at $2,000."

Although appellees do not contend that the case referred to is a holding upon any issue here involved, they believe that this recent statement of the Court upon a matter constituting an issue of fact and so treated by this Court, is of weight.

Appellees do not deny that from the aspect of policing liquor both manufacturers and importers are the source of liquor within the state, and that if liquor from the two sources are to be policed effectively it is necesary to police foreign liquor in the hands of the importer. The tax in question has no relation to such legitimate ends however. The police problem of the state as to foreign beer is not the problem of policing the manufacture of foreign beer but of policing foreign beer after it has been manufactured and is attempted to be brought within the state. As held by this Court in *Seaboard Air Line Railway* v. *North Carolina,* 245 U. S. 298, the state can prevent any possibility of evasion of its laws on the part of importers of foreign beer by requiring railroads to keep records,

open not only to the state but to every citizen of the state, giving all information that the state may require as to the source, quality and destination of beer brought into the state. The state is likewise free to impose any reasonable inspection burdens upon liquor brought within the state. As stated by the Court in *Turner* v. *Maryland*, 107 U. S. 38, 55:

> "Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements."

The state is also free to impose whatever restraints it may wish to impose upon persons who import beer for resale within the state by imposing those restraints upon them in their character as sellers of such beer. Since importers are necessarily sellers, any regulations or restrictions which the State may choose to impose upon importers of foreign beer may be accomplished by imposing non-discriminatory regulations or restrictions upon all persons selling beer within the State. If California believes that a high tax will tend to cause a better quality of persons participating in the business of selling beer at wholesale, whether that beer be domestic or foreign beer, it can give effect to that belief by imposing a high tax upon wholesalers of beer, whether domestic or foreign. So far as policing beer is concerned, it is obvious that there can be no more reason to place a burdensome tax upon the business of buying and selling at wholesale foreign beers in order to

keep irresponsible persons from engaging in that business than there is to impose a burdensome tax upon the wholesalers of domestic beer for the purpose of keeping irresponsible persons out of that business. There being no proper basis in fact for such a distinction, to make such a distinction obviously discriminates against foreign beer and its manufacturers and dealers in favor of domestic beer and its manufacturers and dealers.

Unsound as are appellants' views on this phase of the argument, yet, assuming their contention that one engaged in the importation of beer into the state for sale at wholesale is in a position comparable to that of the manufacturer within the state, the Statute makes it clear that they do not obtain equal privileges for the same permit fee. The manufacturer, in addition to securing the privilege of producing beer within the state, has also the privilege of packaging, flavoring, coloring, labeling, exporting, and selling the same. An importing wholesaler, under both licenses required of him, has only the privilege of importing and selling. If he bottles or packages, he must pay a further license fee of $500. Thus, in order to secure rights comparable with those of the manufacturer, he must pay $1,050. This simply pursues the appellants' argument, unsound in its premise that an importing wholesaler is in a comparable position to a manufacturer, to the error of its conclusion independent of its fallacious premise.

The tax in question being a privilege or occupation tax, the equality of its burden is to be determined by the privilege obtained through its payments. The only difference between the privileges obtained under a wholesaler's license and the privileges obtained under both a wholesaler's license and an importer's license is the privilege of purchasing out-

side the state. Source of purchase thus measures the cost of the privilege. Source though justifying the provisions of the act designating who shall pay the barrel tax of 62½¢, levied on all beer sold in the state, furnishes no justification for a difference in the privilege tax, as pointed out in this argument.

The discrimination of the statute is direct and obvious. Its purpose and effect are to embarrass and discourage importers of beer manufactured outside the state.

POINT IV

THE ACT IS INVALID BECAUSE IT DENIES TO APPELLEES THE EQUAL PROTECTION OF THE LAWS.

The Fourteenth Amendment guarantees to appellees the equal protection of the laws. While this guarantee does not preclude the states from resorting to classification for the purposes of legislation, it does require that the classification be reasonable, not arbitrary, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415. The classification must be founded upon real differences, as distinguished from artificial ones. *Colgate* v. *Harvey,* 296 U. S. 404, 423. The only difference between appellees who as wholesalers are required to pay license fees aggregating $550 and other wholesalers within the state who are required to pay $50 is the difference in the origin of the product which they handle. The product itself is the same, and in its geographical origin alone no such difference is found as will support a difference in legislative treatment.

The appellants do not contend that the classification created is not arbitrary or that it is based upon any real difference in the circumstances which determine the incidence of the liability. It is appellant's contention that the Fourteenth Amendment can under no circumstances furnish protection to one engaged in the business of selling intoxicating liquors. Appellants state, at page 28 of their brief:

> "In view of the repeated and emphatic declarations of the highest Court of our land, an attack on liquor laws as being in violation of the Fourteenth

> Amendment to the Federal Constitution hardly seems to merit serious consideration at this late date."

Extended consideration will not be given here to what rights may "at this late date" be claimed under the due process clause against purely arbitrary and unreasonable state legislation. Suffice it to say that, although the cases cited establish that the state may, when the subject matter be intoxicating liquor, adopt whatever measures are appropriate for the protection of the public morals, public health, or public safety, even to the extent of absolute prohibition, "it does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State." See *Mugler* v. *Kansas,* 123 U. S. 623, 661.

By the equal protection of the laws clause of the Fourteenth Amendment the power of the state as it is exercised over intoxicating liquors is restrained by the same principles as the power of the state is restrained when exercised over any other article, and the treatment of the persons within the same class must under the law be the same. See *Lloyd* v. *Dollison,* 194 U. S. 445, 447, 448; *Cox* v. *Texas,* 202 U. S. 446, 450. The nature of the subject of legislation respecting intoxicating liquors may justify a classification that could not be justified if the subject were any other commodity, but the nature of the subject matter does not change the nature of the constitutional limitation.

The case of *Cox* v. *Texas,* 202 U. S. 446, is cited to sustain a proposition broader than its holding and without regard to the express recognition of the Court that even in the case of liquor legislation it is proper for the Court to inquire whether the classification adopted denies

to any person the equal protection of the laws. The objections to the state legislation involved in that case were disposed of, not by the language quoted by appellants, but by the statement:

> "But, so far as we know, there is no natural distinction of classes among liquor sellers—one class selling their own domestic wines alone, another selling all intoxicants except domestic wines. The statutes regulate the doing of certain things, which presumably all liquor sellers would prefer to be free to do. Therefore whatever other objections there may be to them they do not deny the equal protection of the laws by forbidding without justification to one what they permit to another class" (p. 450).

Thus, the Court placed its decision upon the ground that there were not two classes of persons subject to different treatment but that the statute applied uniformly to all persons within any given class. The language quoted by appellant was used by the Court upon an issue of pleading and was intended to show that since the state statute had been assailed in the state court solely on the ground of conflict with the Fourteenth Amendment, the commerce clause could not be invoked to give the provisions of the Fourteenth Amendment a more extensive application than it would have when taken by itself. As the Court stated while discussing this question of pleading, the states are not restricted by the Fourteenth Amendment from enacting "statutes such as those before us", *i. e.*, statutes which, like the statute there before the Court, have been found to contain no arbitrary classification.

The ground on which the Court sustained the statute involved in *Cox* v. *Texas* is likewise made clear by the cases

cited. One such case is *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, in which this Court held valid an act which imposed an occupational tax upon refiners of sugar but which exempted refiners who manufactured sugar from cane of their own production. The theory sustaining such exemption is given expression in the following language of the Court:

> "But from time out of mind it has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market. The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth or production. The act is not one exempting planters who use their sugar in the manufacture of articles of a wholly different description, such as confectionery, preserves or pastry, or such as one which should exempt the farmer who devoted his corn or rye to the making of whiskey, while other manufacturers of these articles were subjected to a tax. A somewhat different question might arise in such case, since none of these articles are the natural products of the farm—such products only becoming useful by being commingled with other ingredients. Refined sugar, however, is the natural and ultimate product of the cane, and the various steps taken to perfect such product are but incident to the original growth" (p. 92).

Reymann Brewing Co. v. *Brister,* 179 U. S. 445, another case cited to sustain the decision in *Cox* v. *Texas,* ap-

plies the same principle to a manufacturer selling at his plant the production of his factory as an incident to his business of manufacture.

Cox v. *Texas* and the cases supporting that decision have, therefore, no application here, since appellees are not attacking the failure of the California act to impose a tax upon local manufacturers for the privilege of selling their product, as distinguished from manufacturing it. The theory of those cases is that those engaged in the production and manufacture of an article constitute a distinct natural class from those engaged in its sale; that while a manufacturer of a product is also a seller thereof, such sale is incidental to the production or manufacture and that classification is to be determined not by its incidents but rather by its essentials. The classification adopted by the statute in this case applies the exact reverse of such principle. Wholesalers of both domestic and foreign beer in California engage in entirely identical business transactions. As an essential incident of the business of a wholesaler of foreign beer, the product which he handles crosses a state line. To base a classification upon this incident is clearly to base it upon an incident which has no relation to the essential nature of the business regulated, or to the protection of the public morals, the public health or the public safety. As well might the state classify wholesalers of intoxicating liquors upon the basis of what county lines the products which they handle cross, or require that persons selling liquor produced in the northeast and southwest corners of the state pay a higher tax for the privilege of doing business than those selling liquor produced in the northwest and southeast corners of the state. Such classifications, as the classification in the present case, would clearly be based

upon artificial differences and would fail to treat all persons similarly circumstanced alike.

This Court recently said in *Colgate* v. *Harvey*, 296 U. S. 404, 423:

> "As the Supreme Court of Vermont itself has pointed out, in all such cases it must appear not only that a classification has been made, but that it is one based on some reasonable ground. *State* v. *Hoyt*, 71 Vt. 59, 64-66; 42 Atl. 973. The decision in that case held invalid a state statute the effect of which was to impose a tax upon sales of goods manufactured in the state, while leaving sales of goods manufactured in other states free from taxation. It was held that the classification could not be based on any difference in the goods, because there was none; nor on the fact that they were made in different states, for that bore no just and proper relation to the classification, but was purely arbitrary; nor on the difference of residence of the manufacturers, for the same reason. And clearly the view of the court was that a like discrimination against the products of another state would have been open to the same objections."

The state may undoubtedly completely prohibit transactions in intoxicating liquor and adopt any lesser degree of regulation which it deems will promote public welfare, but it is equally obvious that the right to regulate even to the extent of prohibition does not permit regulation in a manner which arbitrarily discriminates between different classes of persons and which has no reasonable basis in fact. This principle is demonstrated in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389. In that case it was held that a statute taxing the gross receipts derived by corporations from their taxicab business within the state,

but which laid no like tax upon individuals and partnerships in the same business, was invalid as a denial of the equal protection of the laws, even as applied to a foreign corporation. The Court said:

> "The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the Federal Constitution."
>
> * * * * * * * *
>
> "The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation" (pp. 400, 402).

The situation thus presented as to a foreign corporation is virtually the same as that presented here. While the state might, in the exercise of its police power, wholly deny the privilege of selling intoxicating liquor, yet, when it does permit such sale, it must treat each person engaging in the business on the basis of equality with others similarly situated. Failing to do this, the action of the state falls within the condemnation of the equal protection clause.

Because of the peculiar characteristics of intoxicating liquors the states have been permitted to regulate liquor and transactions in liquor to an extent not permitted in their regulation of other commodities. This unusual power of the state with respect to this peculiar commodity is permitted "for the protection of the public morals, the public health, or the public safety." *Mugler* v. *Kansas*, 123

U. S. 623, 661. Regulations of the state relating to liquor but not designed for the protection of the public morals, health, or safety, are therefore subject to limitations upon state power to the same extent as are regulations relating to any other commodity. It is obvious that the classification made by the statute now before this Court results in a discrimination which has no relation to furthering the public morals, health or safety. Appellants do not contend to the contrary. The classification here made follows no natural lines of distinction and attempts to deal arbitrarily with persons whose difference in situation furnishes no basis for difference in treatment. It thus falls within the condemnation of the equal protection clause of the Fourteenth Amendment.

POINT V

FINDING XV OF THE COURT BELOW IS FULLY SUPPORTED BY THE RECORD.

Finding No. 15 is sustained by the facts admitted. The fifteenth Finding of the court (R. 55), in substance finding that the imposition of an importer's license fee at each of plaintiff's points of distribution is a direct charge upon the beer imported and upon the prices at which it may be sold in the state, and, as such, a discrimination against beer manufactured outside the state in favor of beer manufactured within the state, is sustained by the record. The finding is no more than a statement of the conclusion which follows from the admitted facts. No proof was needed in support of the same as the burden falls upon the product in the manner found by the court as a matter of economic consequence. The thought is well expressed in *Brown* v. *Maryland,* 12 Wheat. 419, 444, in which this court uses the following language:

> "All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. * * * So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made."

CONCLUSION

It is submitted that the decree of the court below should be affirmed.

Respectfully submitted,

FREDERICK H. WOOD,
Of Counsel.

M. J. DONNELLY,
C. J. LYNCH, JR.,
WILLIAM M. DALLAS,
JOHN E. O'HORA,
Counsel for Appellees.

APPENDIX A

CALIFORNIA ALCOHOLIC BEVERAGE CONTROL ACT

Chapter 330, Laws 1935.

AN ACT to license, regulate and control the manufacture, transportation, sale, purchase, possession and disposition of alcoholic beverages; to levy an excise tax on the sale of alcoholic beverages; to provide for the licensing of the manufacture, distribution and sale of alcoholic beverages; to prescribe penalties for the violation of this Act; to make an appropriation for the enforcement of this Act; to take effect immediately.

The people of the State of California do enact as follows:

Section 1. This Act is known and may be cited as the "Alcoholic Beverage Control Act."

Section 2. The following words, terms, and phrases when used in this Act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) "Alcohol" means ethyl alcohol, hydrated oxide of ethyl, or spirits of wine, from whatever source or by whatever process produced.

(b) "Alcoholic beverage" means and includes alcohol, spirits, liquor, wine, beer and every liquid or solid containing alcohol, spirits, wine or beer, and which contains one-half of one per cent or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed or combined with other substances.

(c) "Beer" means any alcoholic beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops or any other similar product, or any combination thereof in water, and shall include ale, porter, brown, stout,

lager beer, small beer and strong beer but shall not include sake known as Japanese rice wine.

(d) "Distilled spirits" means ethyl alcohol, spirits of wine, whiskey, rum, brandy, gin and other distilled spirits for beverage use, including all dilutions and mixtures thereof.

(e) "Wine" means the product obtained by the fermentation of grapes or other agricultural products containing natural or added sugar or any such alcoholic beverage fortified with grape brandy and containing not more than twenty-four per cent of alcohol by volume and shall include sake known as Japanese rice wine.

(f) "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number.

(g) "Board" means the State Board of Equalization of the State of California.

(h) "Club" means a corporation or association which is the owner, lessee or occupant of an establishment operated solely for objects of a social or athletic nature, having a bona fide membership list, and the majority of the members of which pay dues at least once in every year, but not for pecuniary gain, and the property as well as the advantages of which belong to the members.

(i) "Manufacturer" means every person, who within the State of California, brews, ferments, distills, cuts, blends, rectifies, or otherwise processes, produces, or manufactures alcoholic beverages containing one-half of one per cent or more of alcohol by volume; provided that any person who manufactures not to exceed two hundred gallons of wine per year for his own consumption, shall not, because of such manufacture, be considered a manufacturer within the meaning of this Act.

(j) "Rectifier" means every person who colors, flavors, or otherwise processes distilled spirits by distillation, blending, percolating or other processes.

(k) "Importer" means every person who, in the case of alcoholic beverages brought into this State from outside of this State, is the first in possession thereof within this State after the Act of importation is completed.

(l) "Sell" or "sale" and the phrase "to sell" means and includes any of the following: to exchange, barter, traffic in; to solicit or receive an order for; to keep or expose for sale; to serve for a consideration with or without meals; to traffic in or deliver for value or in any way other than gratuitously; to possess with intent to sell. The transfer of title to alcoholic beverages unaccompanied by a transfer of possession of such beverages shall not be deemed a sale of such beverages.

(m) "Public bar" means any bar, counter or other structure over which beverages of an alcoholic content in excess of four per cent by weight are sold or served by the drink to the public for consumption on the premises; provided, however, that counters or other structures used for the sale, service and consumption of meals, and not as a subterfuge for a public bar, shall not be deemed to be a public bar within the meaning of this Act. "Public barroom" or "public saloon" means any room to which the public has access in which is maintained a "public bar."

(n) "Package" or "original package" means any container or receptacle used for holding alcoholic beverages which is corked or sealed with a stub, stopper or cap, or in any other manner.

(o) "To bottle" or "to package" means to bottle, barrel, or otherwise place alcoholic beverages in a container.

(p) "Distiller" means a manufacturer who produces distilled spirits from naturally fermented material.

(q) "Proof spirits" means that alcoholic liquor which contains one-half of its volume of pure ethyl alcohol of a specific gravity of 0.7939 at sixty degrees Fahrenheit, referred to water at sixty degrees Fahrenheit as unity.

(r) "Proof gallon" means a gallon of proof spirits, or an equivalent amount of alcohol.

(s) "Wholesaler" means and includes every person other than a manufacturer or rectifier who is engaged in business as a broker, jobber or wholesale merchant, dealing in alcoholic beverages.

(t) "Wholesale sale" or "sale at wholesale" means a sale to any person for purposes of resale.

(u) "Retailer's on-sale license" means and includes on-sale beer licenses, on-sale beer and wine licenses, and on-sale distilled spirits licenses.

(v) "Gallon" or "Wine gallon" means that liquid measure containing two hundred thirty-one cubic inches.

(w) "Wine manufacturer" means any person engaged in the manufacture of wine as the term "wine" is defined in this Act.

(x) "Still" means a still used in the production or capable of being used in the production of alcoholic beverages, and does not include stills or apparatus used solely in the production of distilled water or substances other than alcoholic beverages.

Section 3. On and after July 1, 1935, no person shall perform any Act or Acts which would constitute such person a manufacturer, rectifier, importer, wholesaler, or retailer of any alcoholic beverage within the meaning of this Act or shall package, label or sell any alcoholic beverage unless such person is authorized to do so by a license duly issued pursuant to the provisions of this Act, or pursuant to the provisions of the State Liquor Control Act, Chapter 658, Statutes of 1933. Any person violating any provision of this section shall be guilty of a misdemeanor.

Section 4. On and after July 1, 1935, every still located within the limits of this State must be registered with the board. Every person owning or possessing a still who fails to register the same as herein required or who fails to obtain a license issued pursuant to the provisions of this Act authorizing the ownership and possession of such still shall be guilty of a felony.

The board may seize and summarily destroy any still which is not registered or for which a license has not been obtained as required by this Act.

Section 5. The following are the types of licenses to be issued under this Act and the annual fees to be charged therefor:

1. Beer manufacturer's license	$750.00 per year
2. Wine manufacturer's license, one thousand gallons or less per year	5.00 per year
Over one thousand gallons to two thousand five hundred gallons per year	10.00 per year
Over two thousand five hundred gallons to five thousand gallons per year	20.00 per year
Over five thousand gallons to twenty thousand gallons per year	40.00 per year
Over twenty thousand to one hundred thousand gallons per year	75.00 per year
Over one hundred thousand to two hundred thousand gallons per year	100.00 per year
Over two hundred thousand gallons to one million gallons a year	150.00 per year
For each million gallons or fraction thereof over a million gallons an additional	100.00 per year
3. Distilled spirits manufacturer's license	250.00 per year
4. Still license	10.00 per year per still
5. Rectifier's license	250.00 per year
6. Fruit brandy manufacturer's license	150.00 per year
7. Distilled spirits and wine importer's license	100.00 per year
8. Beer importer's license	500.00 per year
9. Wine bottling or packaging license	10.00 per year
10. Distilled spirits bottling or packaging license	250.00 per year
11. Beer bottling or packaging license	500.00 per year
12. Distilled spirits wholesaler's license	250.00 per year
13. Beer and wine wholesaler's license	50.00 per year
14. Retail package off-sale beer and wine license	10.00 per year
15. Retail package off-sale distilled spirits license for the first $10,000 retail sales per year	100.00 per year
For each $1,000 retail sales or fraction thereof over $10,000 per year	10.00 per year
16. Industrial alcohol dealer's license	50.00 per year
17. On-sale beer license	25.00 per year
18. On-sale beer and wine license	75.00 per year
19. On-sale beer and wine license for trains (per train)	15.00 per year
20. On-sale beer and wine license for boats (per boat)	50.00 per year
21. On-sale distilled spirits license	As set by the board

The fees specified above shall be reduced twenty-five per cent for each full quarter of a year elapsing between the first day of the year for which the license is issued and the date on which the application for the license is filed with the board; provided, that where an application clearly indicates that the applicant does not desire to exercise the privileges granted by the license applied for until on or after the beginning of the quarterly period following the quarterly period in which the application is filed with the board, such fees shall be reduced twenty-five per cent for each full quarter of a year elapsing between the first day of the year for which the license is issued and the date so indicated in the application.

Where the fee for any license is graduated according to the amount of alcoholic beverages manufactured or sold under the license, and the license is applied for after the beginning of the year, the amount of alcoholic beverage authorized to be manufactured or sold under the license shall be reduced proportionately with the reduction in fee provided in the preceding paragraph in accordance with such rules and regulations as the board may prescribe.

Section 6. Except as otherwise provided in this Act and subject to the provisions of Section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges and no others at the premises for which issued during the year for which issued.

(a) Any manufacturer's license authorizes the person to whom issued to become a manufacturer of the alcoholic beverage specified in the license, to package, mix, flavor and color and label the same and to export or sell such alcoholic beverages to persons holding licenses issued by the board authorizing the sale of such alcoholic beverage; provided that a wine manufacturer's license authorizes the manufacture of grape brandy to be used exclusively for fortifying purposes by its holder on the premises for which issued.

(b) A still license authorizes the person to whom issued to own or possess the number of stills indicated in the license upon the premises for which issued.

(c) A rectifier's license authorizes the person to whom issued to cut, blend, mix, flavor, color and bottle distilled spirits and to export or sell such products to persons holding licenses issued by the board authorizing the sale of distilled spirits.

(d) Any importer's license authorizes the person to whom issued to become an importer of alcoholic beverages specified in the license and to export such alcoholic beverage.

(e) A bottling or packaging license authorizes the labeling, bottling or packaging of the alcoholic beverages specified in the license.

(f) Any wholesaler's license authorizes the sale of the alcoholic beverage specified in the license only to persons holding licenses issued by the board authorizing the sale of such alcoholic beverage.

(g) An off-sale beer and wine license authorizes the sale, to consumers only and not for resale, of beer in packages and in quantities of thirty-one gallons or less, per sale and the sale of wine in packages and in quantities of fifty-two gallons or less, per sale for consumption off the premises where sold.

(h) An off-sale distilled spirits license authorizes the sale, to consumers only and not for resale, of distilled spirits in quantities of less than five gallons per sale and in packages of one gallon or less for consumption off the premises where sold.

(i) An industrial alcohol dealer's license authorizes the sale of undenatured ethyl alcohol or other distilled spirits in packages of more than one gallon for use in the trades, professions or industries.

(j) Any on-sale license authorizes the sale of the alcoholic beverage specified in the license for consumption on the premises where sold. An on-sale beer and an on-sale

beer and wine license also authorizes the exercise, with respect to the particular beverage or beverages mentioned in such license, of the rights and privileges granted by an off-sale beer and wine license. On trains and boats, under such licenses, alcoholic beverages may be sold only to passengers or employees.

Section 7. Each license issued under this Act shall be issued to a specific person, and, except in the case of licenses authorizing the sale of alcoholic beverages on trains or boats, shall be issued for a specific location, the principal address of which shall be indicated on the license. Separate licenses shall be issued for each of the premises of any business establishment having more than one location.

Licenses for trains and boats shall be based on the average number in actual operation, during the license year, of each class of operating units, viz., trains and boats upon which the license privileges are exercised, such average number to be determined as the board may prescribe.

Each license issued under this Act is separate and distinct, shall be nontransferable from one person to another, and shall be transferable from the premises for which issued only as may be permitted by the board, upon payment of a transfer fee of five dollars for each license.

Whenever a license certificate issued under the Act is lost or destroyed, the board shall issue a duplicate license upon the payment of a fee of five dollars.

Section 8. All retailer's on-sale licenses shall be issued on a calendar year basis and shall automatically expire at midnight on the last day of December of the year for which issued. All other licenses issued under this Act shall be issued on the basis of a fiscal year commencing July first and ending June thirtieth, and shall automatically expire at midnight on the last day of June of the year for which issued.

All licenses issued under the provisions of the State Liquor Control Act, Chapter 658, Statutes of 1933, which authorize the sale of liquor specified in the licenses for consumption on the premises shall automatically expire at midnight on December 31, 1935.

All other licenses issued under said Act and all licenses issued under the provisions of Chapter 178, Statutes of 1933, shall automatically expire at midnight on June 30, 1935. One-half the annual fee for any license so expiring at midnight on June 30, 1935, shall be allowed as a credit against the fee for any comparable license issued under this Act during 1935.

For failure to reapply for a license prior to the time when any license expires, the board may by regulation prescribe that in addition to the license fees specified in Section 5 hereof a penalty of not to exceed twenty-five per cent of such fees must be paid.

Section 9. Upon receipt of any license issued hereunder the licensee shall sign said license and shall post the license in a conspicuous place upon the licensed premises. Licenses issued for trains or boats may, in lieu of being posted upon the train or boat for which issued, be posted in such other place in this State as the board shall designate.

Section 10. To obtain a license under this Act application therefor, accompanied by the license fee therefor, must be made to the board upon a form prescribed by the board. The application must contain the name of the applicant, and in the case of a copartnership, the names of the individual parties, in the case of a corporation the principal officers and directors, the location of the premises for which a license is applied and such other information as the board may require to assist it in determining whether the applicant and the premises qualify for a license. The board may require that the application for any on-sale license be verified under oath and be endorsed by five freeholders or householders of the city or county in which the applicant resides or the premises are located.

Section 11. Upon receipt of an application for a license and the license fee the board shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license. The board must deny an application for a license if either the

applicant or the premises for which a license is applied do not qualify for a license under this Act.

If an application is denied, three-fourths of the license fee paid, or an amount equal to the license fee paid less ten dollars, whichever is greater, shall be returned to the applicant and the balance shall be deposited in the alcoholic beverage control fund hereinafter created.

Section 12. No on-sale distilled spirits license shall be issued to any applicant who is not a citizen of the United States; and where a corporation, partnership or other business association is the applicant no such license shall be issued to it unless the majority of the members of the board of directors and all of its officers who are charged with the duty of managing, directing or conducting said business, are citizens of the United States.

Section 13. The board is specifically authorized to refuse the issuance of on-sale retail licenses for premises located within the immediate vicinity of churches, hospitals, schools and children's public playgrounds.

Section 14. No retail license shall be issued to any applicant for any premises for which a license has been forfeited or revoked, during the three months immediately preceding the filing of such application.

Section 15. No retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county, city and county or municipality unless such premises had been used in the exercise of such rights and privileges at a time prior to the effective date of any such valid zoning ordinance.

Nothing in this Act contained shall be deemed to interfere with the powers of cities, counties, and cities and counties, conferred upon them by Chapter 734, Statutes of 1917, the same being An Act of the Legislature entitled, "An Act to provide for the establishment within municipalities of districts or zones within which the use of property, height of

improvements and requisite open spaces for light and ventilation of such buildings, may be regulated by ordinance."

Section 16. No retailer's on-sale license shall be issued to any person to whom or for any premises for which a manufacturer's, importer's, wholesaler's or rectifier's license shall have been issued, and no manufacturer's, importer's, wholesaler's or rectifier's license shall be issued to any person to whom or for any premises for which a retailer's on-sale license is issued.

Section 17. No license shall be issued to any applicant for any premises situated more than one mile outside the limits of an incorporated city or town and within four miles of any camp or establishment of men numbering twenty-five or more, engaged upon or in connection with the construction, repair or operation of any work, improvement or utility of a public or quasi public character; provided, however, that nothing in this section shall be deemed to apply to the renewal of any licenses for any premises which have been established and licensed under this Act or under the State Liquor Control Act, Chapter 658, Statutes of 1933 at least six months prior to the establishment of such camp or establishment of men.

Section 18. Retailer's "on-sale beer and wine licenses" or "on-sale distilled spirits licenses" shall be issued only to bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships or other public eating places, or bona fide clubs after such clubs have been lawfully operated for not less than one year.

Section 19. Fruit brandy manufacturer's licenses shall be issued only to persons holding a wine manufacturer's license.

Section 20. Industrial alcohol dealers' licenses shall be issued only to persons to whom, and for premises, for which, either a distilled spirits manufacturer's importer's or wholesaler's license has been issued.

Section 21. Before commencing to engage in the sale of any alcoholic beverage at any premises, notice of intention to so commence, must be posted in a conspicuous place at the entrances to such premises. Licenses will not be issued for such premises until such notice has been so posted for fifteen consecutive days immediately prior to the issuance of the licenses. The notice herein specified shall be in such form as the board shall prescribe.

Upon the receipt by the board of an original application for any license, notice thereof shall immediately be given by said board to the sheriffs, chiefs of police and district attorneys of such locality, and to the city clerks and city planning commissions in such locality upon request.

Section 22. In the case of any applicant whose license fee varies with the total amount of alcoholic beverages manufactured or sold, the applicant shall at the time of filing application for license, accompany such application with the minimum license fee required, or such larger fee as the applicant shall elect.

The licensee shall report quarterly at such time and in such manner as the board may prescribe, the amount of alcoholic beverages manufactured or sold during the preceding quarter.

If any such report shows that the total amount of alcoholic beverages manufactured or sold during the year exceeds the amount permitted annually by the license fee already paid the board, the licensee shall accompany such report with such additional license fee as shall authorize him to continue to manufacture or sell additional amounts of alcoholic beverages in accordance with the schedule provided in Section 5.

Failure to report the amount of alcoholic beverages manufactured or sold as herein required and to pay such additional license fees when due within ten days of the date set by the board, shall be considered a violation of this Act, and shall also subject the licensee to an arbitrary assessment of such license due by the board.

Failure to make a final report and payment of any license due at the end of any tax year shall operate to prevent the board from issuance of any license to any delinquent licensee.

Section 23. An excise tax is hereby imposed upon all beer and wine sold in this State by a manufacturer or importer on or after July 1, 1935, at the following rates:

(a) On all beer, sixty-two cents for every barrel containing thirty-one gallons, and at a proportionate rate for any other quantity;

(b) On all wine, two cents per wine gallon, and at a proportionate rate for any other quantity;

(c) On champagne, or sparkling wine, whether naturally or artificially carbonated, three cents per pint or fraction thereof.

Beer and wine consumed by employees of manufacturers or importers upon the premises of such manufacturers and importers shall be exempt from tax under such rules and regulations as the board may prescribe.

It shall be presumed, for the purposes of this Act, that all beer and wine produced, brewed, fermented, or manufactured in this State by a manufacturer, or delivered to a manufacturer or importer here, has been sold by such manufacturer or importers unless proven to the satisfaction of the board that such beverages are still in the possession of such manufacturer or importer, or, prior to the termination of such possession, have been lost through evaporation, leakage, spillage or destruction by the elements.

Section 24. An excise tax is hereby imposed upon all distilled spirits sold in this State on and after July 1, 1935, at the following rates:

On all distilled spirits of proof strength or less, two cents on each bottle containing two ounces or fraction thereof; five cents on each bottle containing eight ounces or fraction thereof greater than two ounces; ten cents on each bottle containing one pint or fraction thereof greater than a half pint; sixteen cents on each bottle containing one-fifth gallon or fraction thereof greater than one pint; twenty cents on each bottle containing one quart or fraction thereof greater than one-fifth gallon; forty cents on each bottle containing one-half gallon or fraction thereof, greater than one quart; eighty cents on each bottle contain-

ing one gallon or fraction thereof greater than one-half gallon.

All distilled spirits in excess of proof strength shall be taxed at double the above rate.

Section 25. Every person who engages in business as, or becomes a manufacturer or importer of beer or wine, as defined in this Act, shall be required by the board to file with said board a bond duly executed by such person as principal and a corporation such as is mentioned in Section 1056 of the Code of Civil Procedure in this State, as surety, payable to the people of the State of California, conditioned upon the payment of all excise taxes and penalties assessed against or imposed upon such person, arising out of this Act.

The bond shall contain the provisions and be in the form substantially as follows:

"Know all men by these presents:

That we,....., as principal, and..... a corporation duly organized and doing business under and by virtue of the laws of....., and duly licensed for the purpose of making, guaranteeing or becoming sole surety upon bonds or undertakings required or authorized by the laws of the State of California, as surety, are held and firmly bound unto the people of the State of California in the sum of.....dollars ($.....), lawful money of the United States of America, for the payment whereof well and truly to be made, we bind ourselves, our heirs, executors, successors and assigns, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that,

Whereas, the above bounden principal has made application to the State Board of Equalization of the State of California for a license authorizing said principal to engage in business as a manufacturer or importer of beer or wine within the meaning of the Alcoholic Beverage Control Act and amendments thereto, and

Whereas, under the terms of said Act a bond is required of said principal and good and sufficient surety, payable to

the people of the State of California, conditioned upon the payment to the State of California of all of the excise taxes and penalties assessed against or imposed upon said principal arising out of said Act.

Now therefore, if the above bounden principal shall pay all excise taxes and penalties assessed against or imposed upon said principal arising out of said Act, or if the board, within thirty days after any default by said principal in the payment of any such tax or penalty shall fail to notify the surety thereof, personally or by mail, then this obligation shall be null and void: otherwise to remain in full force and effect.

That said bond shall remain in force and effect until the surety or sureties are released from liability by said board or until said bond is canceled by said surety or sureties as hereinafter provided.

The surety herein reserves the right to withdraw as such surety, except as to any liability already incurred or accrued hereunder, and may do so upon giving written notice of such withdrawal to the State Board of Equalization; provided, however, that no withdrawal shall be effective for any purpose until thirty days shall have elapsed from and after receipt of such notice by said board; and further provided, that no withdrawal shall in anywise affect the liability of said surety arising out of any sale of beverage made by the principal herein prior to the expiration of such period of thirty days, regardless of whether or not the excise tax based upon such sale shall have been due prior to the expiration of such period.

Signed and sealed this.....day of....., 193...

.....
Principal.

By.....

.....
Surety.

By.....”

The total amount of the bond or bonds required of any such manufacturer or importer shall be fixed by the board and may be increased or reduced by said board at any time subject to the limitations herein provided. In fixing the total amount of the bond or bonds required of any such manufacturer or importer, the board must require a bond or bonds equivalent in total amount to one and one-half times his estimated monthly excise tax determined in such manner as said board may deem proper; provided, that the total amount of the bond or bonds required of any such manufacturer or importer shall never be less than five hundred dollars.

Section 26. Every manufacturer or importer of alcoholic beverages taxable under this Act shall render to the board on or before the tenth day of August, 1935, and on or before the tenth day of each month thereafter, a verified statement of the quantity of such alcoholic beverage sold by such manufacturer or importer during the preceding calendar month. Such statement shall be in such form as the board may prescribe, together with such other information as the board may require.

If any manufacturer or importer shall fail, neglect or refuse to file said report, within the time prescribed for filing such report, the board must note such failure, neglect or refusal upon the tax roll hereinafter described, and must estimate the amount of alcoholic beverage sold by said manufacturer or importer assessing the excise tax thereon, adding to said excise tax a penalty of fifteen per cent thereof for failure, neglect, or refusal to report. Such action of the board shall be final, and subject only to review by a court of competent jurisdiction.

The board shall, on or before the twenty-second day of August, 1935, and on or before the twenty-second day of each calendar month thereafter, assess the excise tax due hereunder, and prepare and complete an assessment roll showing the amount of the excise tax assessed against each manufacturer and importer and immediately deliver said assessment roll to the State Controller.

Excise taxes herein required to be paid by the manufacturer or importer shall be payable in monthly installments to the State Controller for the month ending July 31, 1935, and for each and every calendar month thereafter. The amount of such excise tax for each month shall be paid on or before the tenth day of the second calendar month thereafter, and if not paid prior thereto, shall become delinquent at five o'clock in the afternoon of said day, and ten per cent penalty shall be added thereto for delinquency.

Section 27. The board may examine the books and records of any person required to make said statement, and may also examine the books and records of any licensee as herein defined, and such books and records shall at all times be subject to the inspection of said board or its representatives during regular business hours.

If any examination or investigations made by the board shall disclose that any reports of manufacturers or importers theretofore filed with said board by said manufacturers or importers pursuant to the requirements of this Act, have shown incorrectly the amount of alcoholic beverage sold or the excise tax accruing thereon, said board shall have the power and is hereby authorized, to make such changes in subsequent assessments of said manufacturers or importers under this Act as it may deem necessary to correct the errors disclosed by its examination of the records of said manufacturers or importers or its investigations in pursuance of its powers hereunder.

Section 28. Any person refusing to permit the board or any of its representatives to make the inspection for which provision is made in the preceding section or failing to keep books of account as may be prescribed by the board or failing to preserve such books for the inspection of the board for such time as the board may deem necessary, and any person altering, canceling or obliterating entries in such books of account for the purpose of falsifying the records of sales of alcoholic beverages made under this Act shall be guilty of a misdemeanor and shall be punished by

a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment.

Section 29. No excise tax shall be imposed by this Act in any transaction whereby any alcoholic beverages are sold and delivered by a manufacturer or importer to another manufacturer or importer holding a valid manufacturer's or importer's license.

In order to obtain the exemption granted under this section, the manufacturer or importer selling alcoholic beverages must present to the board at the time of filing his monthly report required under Section 26, a verified statement, in a form to be prescribed by the board, obtained from the purchaser showing the date, kind and quantity of alcoholic beverage sold and delivered to the purchaser, that the purchaser holds at the time of such purchase, a manufacturer's or importer's license, the number of such license, and such other information as the board may require. A copy of this statement must at all times be kept on file at the place of business of the manufacturer or importer desiring to obtain the exemption herein granted.

Section 30. None of the provisions of this Act shall apply, or be construed to apply, to commerce with foreign Nations or commerce with the several States, except in so far as the same may be permitted under the provisions of the Constitution and laws of the United States nor shall the excise tax imposed by Section 23, of this Act apply to alcoholic beverages sold and actually exported from this State by a licensed manufacturer or importer, or by a subsidiary of a licensed manufacturer or importer, but every manufacturer and importer shall be required to report such exports to the board in such detail as the board may require, otherwise the exemption herein granted shall be null and void and such alcoholic beverage shall be considered sold in this State subject fully to the provisions of this Act.

In support of any exemption from excise taxes claimed under this section on account of the exportation of alcoholic beverage every manufacturer must execute an export certificate in such form as shall be prescribed, prepared and furnished by the board containing a sworn statement made by some person having knowledge of the fact of such exportation that the alcoholic beverage has been exported from this State, and giving such detail with reference to shipment as said board may require. All exportation certificates must be completed and on file in the office of the board within thirty days after the close of the calendar month in which the shipments were made and no certificate not completed and filed within such period shall be recognized for any purpose by the State or any agency thereof. The board may demand of any manufacturer or importer such additional data as is deemed necessary by said board in support of any such certificate and failure to supply such data will constitute waiver of all right to exemption claimed by virtue of said certificate.

Section 31. In any case in which any tax, interest or penalty imposed under this Act is not paid when due the Controller shall notify the board and may file in the office of the county clerk of Sacramento County or any other county a certificate specifying the amount of the tax, interest and penalty due, the name and last known address of the manufacturer or importer liable for the same, that the board has complied with all the provisions of this Act, in relation to the computation and levy of the tax and a request that judgment be entered against the manufacturer or importer in the amount of the tax, interest and penalty set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment for the people of the State of California against the manufacturer or importer in the amount of the tax, interest and penalty set forth in the certificate. The judgment may be filed by the county clerk in a loose-leaf book entitled "Special Judgments for State Excise Tax."

An abstract of such judgment or a copy thereof may be recorded with the county recorder of any county and

from the time of such recording, the amount of the taxes, interest and penalty therein set forth shall constitute a lien upon all the real property of the manufacturer or importer in such county, owned by him or which he may afterwards and before the lien expires acquire, which lien shall have the force, effect and priority of a judgment lien. Execution shall issue upon such a judgment upon the request of the Controller in the same manner as execution may issue upon other judgment and sales shall be held under such execution as prescribed in the Code of Civil Procedure. In all proceedings under this section the Controller shall be authorized to Act on behalf of the people of the State of California.

In the event that any manufacturer or importer is delinquent in the payment of the excise tax herein provided for, the Controller shall notify the board forthwith and may give notice of the amount of such delinquency by registered mail to all persons having in their possession or under their control, any credits or other personal property belonging to such manufacturer or importer, or owing any debts to such manufacturer or importer, at the time of receipt by them of such notice, and thereafter any person so notified shall neither transfer nor make other disposition of such credits, other personal property or debts until the Controller shall have consented to a transfer or disposition, or until twenty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice, advise the Controller of any and all such credits, other personal property or debts, in their possession under their control or owing by them, as the case may be.

Whenever any manufacturer or importer shall be delinquent in the payment of the excise tax herein provided for, the Controller or his duly authorized representative may proceed forthwith to collect the excise tax due from such manufacturer or importer in the following manner: The Controller shall seize any property, real or personal, of the taxpayer, and thereafter sell at public auction such property so seized, or a sufficient portion thereof, to pay the excise tax due hereunder, together with any penalty

or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent manufacturer or importer and to all persons appearing of record to have an interest in such property, in writing at least ten days before the date set for such sale by inclosing such notice in an envelope addressed to said manufacturer or importer at his last known residence or place of business in this State if any, and, depositing same in the United States registered mail, postage prepaid, and by publication for at least ten days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided, however, that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county for said ten days period. The said notice shall contain a description of the property to be sold, together with a statement of the amount of the excise taxes, penalties and costs, the name of the manufacturer or importer and the further statement that, unless such excise taxes, penalties and costs are paid on or before the time fixed in said notice for such sale, said property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

At any such sale, the property shall be sold by the Controller of by his duly authorized agent in accordance with law and said notice, and the Controller shall deliver to the purchaser a bill of sale for the personal property, and a deed for any real property so sold, and such bill of sale or deed shall vest title in the purchaser subject to a right of redemption as prescribed in the Code of Civil Procedure upon sales of real estate on execution. The unsold portion of any property so seized may be left at the place of sale at the risk of the manufacturer or importer. If, upon any such sale, the moneys so received shall exceed the amount of all license taxes, penalties and costs due the State from such manufacturer or importer, any such excess shall be returned to the manufacturer or importer, and his receipt

therefor obtained; provided, however, that if any person having an interest in or lien upon the property has filed with the Controller prior to any such sale notice of such interest said Controller shall withhold any such excess pending a determination of the rights of the respective parties thereto by a court of competent jurisdiction. If, for any reason, the receipt of such manufacturer or importer shall not be available, the Controller shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such manufacturer or importer, his heirs, successors or assigns.

The Controller must also immediately transmit notice of such delinquency to the Attorney General who shall at once proceed to collect all sums due to the State from any such manufacturer or importer hereunder by bringing suit against the necessary parties to effect forfeiture of the bond or bonds of the manufacturer or importer, reducing any deficiency to judgment against the manufacturer or importer.

It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board, Controller or Attorney General shall be or be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this Act.

In any suit brought to enforce the rights of the State hereunder the assessment roll prepared by the board pursuant to Section 26 of this Act, or a copy of so much thereof as is applicable in such suit, duly certified by the Controller showing unpaid excise taxes assessed against any manufacturer or importer, shall be prima facie evidence of the assessment of the excise tax, the delinquency thereof, the amount of the excise tax, penalties and costs due and unpaid to the State, that the manufacturer or importer is indebted to the people of the State of California in the amount of such excise tax and penalties therein appearing unpaid and that all the forms of law in relation to the assessment and levy of such excise tax have been fully complied with by all persons required to perform administrative duties under this Act.

Section 32. Any action to recover any excise tax levied pursuant to this Act and paid under protest must be instituted within sixty days after the payment of such excise tax, and failure to bring suit within said sixty days shall constitute waiver of any and all demands against this State on account of alleged overpayment of excise taxes hereunder. No grounds of illegality of the excise tax shall be considered by the court other than those set forth in the protest filed at the time of the payment of the excise tax.

If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any excise taxes due from the plaintiff under this Act, and the balance of the amount of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount of excise tax found to have been illegally collected from the date of payment of such excise tax to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller.

In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any excise tax paid hereunder, when such action is brought by or in the name of an assignee of the manufacturer or importer paying said excise tax, or by any person, other than the person who has paid such excise tax.

Section 33. The tax imposed by Section 24 of this Act upon the sale of distilled spirits shall be collected by means of attaching to each package containing such distilled spirits a stamp or stamps of a denomination equivalent to the amount of excise tax imposed upon the sale of the contents of such package. Such stamps shall be attached by the holders of on- or off-sale distilled spirits licenses issued under this Act and by the holders of on-sale licenses for liquor other than beer and wine issued under the State Liquor Control Act, immediately upon opening the original cases in which the distilled spirits were packed and in which such distilled spirits were purchased from the manufac-

turer, rectifier, importer, or wholesaler. In the case of distilled spirits not in original cases at the time of purchase the stamps shall be attached immediately upon bringing such distilled spirits upon the premises for which such on- or off-sale licenses are issued.

Such stamps shall be sold by the board only to persons holding valid distilled spirits manufacturer's licenses, rectifier's licenses, distilled spirits and wine importer's licenses or distilled spirits wholesaler's licenses issued under this Act or the State Liquor Control Act; provided, that until July 1, 1935, the board shall sell a sufficient number of such stamps, to stamp stocks of distilled spirits on hand, to persons holding valid on- or off-sale licenses for liquor other than beer and wine issued under the State Liquor Control Act; provided further, that the board may thereafter, in its discretion, sell such stamps to such holders of on- or off-sale distilled spirits licenses as it may determine.

On and after July 1, 1935, all distilled spirits delivered by any manufacturer, rectifier, importer or wholesaler of distilled spirits to any person holding an on- or off-sale distilled spirits license issued under this Act or an on-sale license for liquor other than beer and wine issued under the State Liquor Control Act, must be accompanied by a sufficient number of stamps purchased from the board, to stamp the packages, containing such distilled spirits. Every manufacturer, rectifier, importer or wholesaler of distilled spirits who delivers distilled spirits in violation of this section shall be guilty of a misdemeanor.

Such stamps shall be of such size, type, and character as the board shall determine; provided, that all such stamps must be of a character, design, and process which will give the State the maximum amount of protection against counterfeiting. The board shall have full charge and control of the issuance, securing, or purchase and of the sale of all such stamps and shall keep a record of all stamps sold.

At the time such stamps are attached to the packages of distilled spirits, they shall immediately be canceled by indelibly writing or stamping thereon the number of the licensee attaching the stamp and the date of cancellation.

Section 34. On and after July 1, 1935, it shall be unlawful for any person holding an on- or off-sale distilled spirits license issued under this Act, or an on-sale license for liquor other than beer or wine issued under the State Liquor Control Act to have upon the premises for which any such license is issued any distilled spirits unless the stamps required by this Act to be attached to the packages of such distilled spirits are so attached to said packages and canceled as herein required or unless such distilled spirits are still in the original cases in which such distilled spirits were purchased from the manufacturer, rectifier, importer or wholesaler, and such cases have not been opened since delivery to the premises for which such on- or off-sale licenses are issued.

On and after July 1, 1935, it shall be unlawful for any person holding an off-sale distilled spirits license issued under the Act to sell under such license any distilled spirits unless the stamps required by this Act to be attached to the packages of such distilled spirits are so attached to said packages, and canceled as herein required.

On and after July 1, 1935, it shall be unlawful for any person holding an on-sale distilled spirits license issued under this Act or an on-sale license for liquor other than beer and wine issued under the State Liquor Control Act to serve or remove any distilled spirits from any packages at the premises for which such licenses are issued unless the stamps required by this Act to be attached to the packages are so attached to said packages and canceled as herein required.

On and after July 1, 1935, it shall be unlawful for any person to deliver to any premises, for which an on- or off-sale distilled spirits license is issued under this Act or for which an on-sale license for liquor other than beer or wine is issued under the State Liquor Control Act, any distilled spirits unless the containers of such distilled spirits bear a label or labels plainly indicating the quantity and proof strength of the contents of such containers and the name of the manufacturer or distributor thereof.

On and after July 1, 1935, it shall be unlawful for any manufacturer, rectifier, importer or wholesaler of distilled spirits to deliver to any premises for which an on- or off-

sale distilled spirits license is issued under this Act or an on-sale license for liquor other than beer or wine is issued under the State Liquor Control Act, and it shall be unlawful for any such on- or off-sale licensee to sell at the premises for which any such license is issued distilled spirits in packages containing more than one gallon.

Any person violating the provisions of this section shall be guilty of a misdemeanor.

The board may seize and summarily destroy any distilled spirits found upon any premises in violation of this section.

Section 35. It shall be unlawful for any person other than the board or its duly authorized agents or the holder of a valid distilled spirits manufacturer's license, rectifier's license, distilled spirits and wine importer's license or distilled spirits wholesaler's license issued under this Act or the State Liquor Control Act to sell or give away any stamps issued by the board pursuant to the provisions of this Act unless such stamps are attached to packages of distilled spirits as herein required. Any person violating the provisions of this Section shall be guilty of a misdemeanor.

Section 36. Every person who makes, sells, or uses any false or counterfeit stamp or die for printing or making stamps which is in imitation of or purports to be a lawful stamp, or die of the kind before mentioned in this Act, or who procures the same to be done, and every person who shall remove or cause to be removed, from any package of distilled spirits any stamp denoting the tax thereon, with intent to reuse such stamp, or who with intent to defraud the State, knowingly uses, or permits to be used any stamp removed from another package, or receives, buys, sells, gives away, or has in his possession, any stamp so removed, or makes any fraudulent use of any stamp for distilled spirits, shall be guilty of a felony and shall be fined not less than one hundred dollars nor more than one thousand dollars, and imprisoned not less than six months nor more than three years in the State prison.

Section 37. All moneys collected as license fees and under the excise tax provisions of this Act shall be deposited

in the State treasury to the credit of the alcohol beverage control fund, which fund is hereby created. Moneys in said fund are hereby appropriated as follows:

1. Six hundred thousand dollars for expenditure by the board in carrying out the provisions of this Act for collecting the excise taxes levied by this Act;

2. Twelve thousand dollars, or so much thereof as may be necessary, for expenditure by the Controller in carrying out the provisions of this Act requiring the collection of excise taxes;

3. Sixty thousand dollars to be used by the State Department of Public Health for enforcement work directed toward preventing the manufacture, sale or transportation of adulterated, misbranded or mislabeled alcoholic beverages;

4. One million four hundred thousand dollars to pay the salaries and expenses of auditors, inspectors and clerks employed by the board and to defray the necessary expenses arising by reason of the administration and enforcement of the provisions of this Act;

5. Ten thousand dollars for expenditure by the State Department of Finance in auditing the revenues and expenditures resulting from the provisions of this Act;

6. Fifty per cent of all moneys collected yearly from fees, to be paid to the counties, cities and counties, and cities of this State in the proportion that the amount of the fees collected in the particular county, city and county, or city bears to the total amount so collected throughout the State, and the State Controller shall, on or before March 31 of the year following that in which such moneys were collected, draw his warrants upon said fund in favor of the treasurer of each county, city and county, and city for the amount to which each is entitled hereunder;

7. The expenditures authorized by subdivisions 1, 2, 3, 4 and 5 of this section shall be made exclusively from the remaining fifty per cent of moneys collected from fees and no part thereof from the fifty per cent of fees payable to

counties, cities and counties, and cities under the provisions of subdivision 5 of this section.

8. Such amount as is necessary for the allowance of the refunds provided for in this Act;

9. Any remaining balance to be transferred to the general fund on the order of the Controller approved by the board.

The moneys to be used by the State Department of Public Health for enforcement work shall be expended as provided in "An Act preventing the manufacture, sale or transportation of adulterated, mislabeled or misbranded food, liquor and drugs, and making an appropriation," approved March 11, 1907. The Director of Public Health shall communicate to the State Board of Equalization any findings which indicate that such Act has been violated by any holder of a license under this Act.

Section 38. The board shall administer all of the provisions of this Act and to that end shall prescribe all necessary rules and regulations to carry out such provisions. The board shall have the power to require any report from any licensee, or transportation companies, and to make any examination of the books and records of any licensee it may deem necessary to perform its duties under this Act, and for the performance of its duties shall have all the powers conferred upon it by Section 3692 of the Political Code.

The members of the board and the persons employed by the board for the enforcement of the provisions of this Act shall have the power to administer and certify oaths, and shall have all the powers of peace officers in administering the provisions of this Act.

The board and persons employed by it for the enforcement of this Act shall at all times have the right to visit and inspect any portion of any premises for which licenses are issued under this Act or under the State Liquor Control Act.

Section 39. A written report of a member of the board or of an employee of the board engaged in the enforce-

ment of this Act disclosing that an applicant for a license or the premises for which a license is applied are not qualified for a license under this Act shall constitute grounds for the denial of an application for a license.

Immediately upon the denial of any application for a license the board shall notify the applicant thereof in writing. Within ten days after mailing the notice the applicant may present his written petition for a license to the board.

Upon receipt by the board of a petition for a license in proper form it shall be referred to a representative of the board for hearing.

Protests may be made to the board at any time prior to the issuance of a license against either the original issuance of a license or the renewal of a license.

Protests must be in writing and filed in the main office of the board at Sacramento, and must state one or more grounds which would authorize the board, to deny or refuse the issuance of the license. The original copy of the protest must be verified unless made by public officers acting in their official capacity.

Upon receipt by the board of a protest in proper form it shall be referred to a representative of the board for hearing.

If a license has been issued to the applicant before receipt of the protest by the board, the protest shall be considered as a complaint against the licensee and a hearing had thereon as if a complaint had been filed.

Section 40. Complaints may be made to the board by any person against any licensee. Complaints must be in writing and must state one or more grounds which would authorize the board to suspend or revoke the license or licenses of the licensee against whom the complaint is made.

A written report of a member of the board or of an employee of the board engaged in the enforcement of this Act, or of a public officer disclosing grounds for the suspension or revocation of the license or licenses of any licensee shall be deemed a complaint against the licensee within the meaning of this Act, even though not in the form of a complaint.

The original copy of complaints must be verified unless made by public officers acting in their official capacity or by employees of the board engaged in the enforcement of this Act.

The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

(a) The violation or the causing or the permitting of a violation of this Act or of the rules and regulations of the board by any licensee.

(b) The misrepresentation of a material fact by any applicant in obtaining any license hereunder.

Section 41. Upon receipt by a representative of the board of a protest, a complaint or a petition for a license, the representative shall forthwith cause written notice of the time and place of the hearing of said protest, complaint or petition for a license to be given to the protesting or complaining party as well as the applicant, licensee or petitioner. The hearing shall be set for a date not more than fifteen days nor less than five days subsequent to the mailing of the notice and shall be held in the county seat of the county in which the premises of the applicant or licensee are located.

Enclosed with a copy of the notice of the time and place of hearing sent to the applicant or licensee shall be a copy of the protest or complaint as filed with the board.

The failure of an applicant for a license or a licensee to appear before the representative of the board at the time set for the hearing, except for the intervention of an act of God, shall be deemed an admission by him of the facts or acts charged in the protest or complaint and thereupon the representative of the board shall have the power to act as if the facts charged in the protest or complaint were found to be true.

The board or any member thereof or any representative appointed by the board to conduct hearings shall have the power to administer oaths, certify to all official acts, and to issue subpoenas for the attendance of witnesses and the

production of papers, books, accounts, documents and testimony in any inquiry, investigation, hearing or proceeding in any part of the State.

Each witness who shall appear, by order of the board or member thereof or a representative appointed by it, shall be entitled to receive, if demanded, for each attendance the same fees and mileage allowed by law to witnesses in civil cases in the superior court, which amount shall be paid by the party at whose request such witness is subpoenaed, unless otherwise ordered by the board or the representative. When any witness who has not been required to attend at the request of any party is subpoenaed by the board, or a member thereof or a representative of the board, his fees and mileage may be paid from the funds appropriated for the use of the board in the administration of this Act in the same manner as other expenses of the board are paid in the administration of this Act.

The superior court in and for the county, or city and county in which any inquiry, investigation, hearing or proceeding may be held by the board or a representative appointed by it shall have the power to compel the attendance of witnesses, the giving of testimony and the production of papers, including books, accounts and documents as required by any subpoena issued by the board or any member thereof or a representative appointed by the board.

The board or any representative appointed by it, before whom the testimony is to be given or produced, in case of the refusal of any witness to attend or testify or produce any papers required by such subpoena, may report to the superior court, in and for the county, or city and county, in which the proceeding or hearing is pending, by petition, setting forth that due notice has been given of the time and place of attendance of said witness, or the production of said papers, and that the witness has been subpoenaed in the manner prescribed in this Act, and that the witness has failed and refused to attend or produce the papers required by the subpoena, or has refused to answer questions propounded to him in the course of such proceeding or hearing, and ask an order of said court, compelling the

witness to attend or testify or produce said papers before the board or representative. The court, upon the petition of the board or any member thereof or a representative appointed by the board, shall enter an order directing the witness to appear before the court at a time and place to be fixed by the court in such order, the time to be not more than ten days from the date of the order, and then and there show cause why he did not attend and testify or produce said papers before the board or representative of the board. A copy of said order shall be personally served upon said witness, and service shall not be made by registered mail as otherwise provided in this Act.

If it shall appear to the court that said subpoena was regularly issued by the board or member thereof or a representative of the board and the witness was legally bound to comply therewith, the court shall thereupon enter an order that said witness shall appear before the board or representative at a time and place to be fixed in such order, and testify or produce the required papers, and upon failing to obey such order said witness shall be dealt with as for contempt of court.

Section 42. All hearings and investigations before the board or any representative appointed thereby shall be governed by this Act and other applicable provisions of law not inconsistent herewith and in the conduct of said hearing neither the board nor any representative appointed by it shall be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in such manner through oral testimony and printed records as is best calculated to extend the substantial rights of the parties and carry out jointly the spirit and provisions of this Act.

The board, or any member of the board or any representative appointed by it, or any party to the action or proceeding may, in any investigation or hearing before the board or a representative thereof cause the deposition of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in the superior court of this State, and to that end may compel the attendance of witnesses and the production

of books, documents, papers and accounts; provided that depositions taken outside of the State may be taken before any officer authorized to administer oaths.

Section 43. Within ten days after the hearing the representative of the board shall certify to the board his findings of ultimate fact whether the protest, complaint or petition is true or not, and in the case of hearings on complaints the representative may make recommendations in respect to the suspending or revoking of licenses. The findings and recommendations of the representative shall not be open to public inspection, either to the applicant, licensee, protestant, complainant or any other person.

Section 44. After the findings of the representative of the board are filed, the board shall make its decision upon the petition for a license, protest or complaint, and shall notify the petitioner, protestant, complainant, and licensee thereof. Within ten days after the mailing of the notice, the petitioner, protestant, complainant or licensee may petition the board for a reconsideration of the cause. Such petitions shall be verified unless filed by a public officer acting in his official capacity.

Section 45. Within thirty days after receipt by the board of a petition for reconsideration the board shall itself rehear the entire matter de novo and shall thereupon and within said thirty days either affirm, modify or set aside its original order.

Section 46. The action of the board upon a petition for a license, a protest, complaint, or a petition for reconsideration shall be subject to review by any court of competent jurisdiction.

Section 47. The filing of a petition for reconsideration with the board shall not be a bar to any application to the courts for relief and shall not prevent a court from reviewing or setting aside the action of the board upon a petition for a license, protest or complaint.

Section 48. Service of the notices required by this Act may be made personally or by mail; if by mail service shall be made in the manner prescribed by Section 1013 of the Code of Civil Procedure.

Section 49. Common or private carriers shall transport alcoholic beverages into the State only when such alcoholic beverages are to be consigned to a licensed importer. The carrier must obtain the receipt of such importer for the alcoholic beverage so transported and delivered and, if the consignee refuses to give a receipt and show his importer's license to the carrier, the carrier shall be relieved of all responsibility for delivering said alcoholic beverage. Where the consignee is not a licensed importer the carrier shall immediately notify the board at Sacramento, giving full details as to the character of shipment, point of origin, destination, and address of the consignor and consignee and within ten days such alcoholic beverage shall be summarily forfeited to the State of California and shall be turned over to the board for sale at public auction.

Every person violating the provisions of this section shall be guilty of a misdemeanor.

Section 50. Postal authorities may refuse delivery of any shipment of alcoholic beverage originating outside of this State. Postal authorities may turn such alcoholic beverage over to the board. The beverage when received shall be summarily forfeited to the State, to be sold at public auction by the board. Every person violating the provisions of this section shall be guilty of a misdemeanor.

Section 51. It shall be unlawful for any licensee to have upon any premises for which licenses have been issued to such licensee any alcoholic beverages other than the alcoholic beverages which such licensee is authorized to sell at such premises under the license or licenses issued therefor.

It shall be presumed that all alcoholic beverages found or located upon premises for which licenses have been issued belong to the person or persons to whom such licenses were issued.

Every person violating the provisions of this Section shall be guilty of a misdemeanor. The board or its representatives may either seize and summarily destroy or may seize and sell at public auction any alcoholic beverages found upon any premises in violation of this section.

The board shall also have the power to seize and summarily destroy or sell at public auction the following alcoholic beverages;

1. Alcoholic beverages manufactured in this State by any person other than a licensed manufacturer, regardless of where found;

2. Beer and wine upon the sale of which the excise tax imposed by this Act has not been paid, regardless of where found;

3. Distilled spirits except (a) distilled spirits located upon premises for which licenses authorizing the sale of such distilled spirits have been issued; (b) distilled spirits consigned to and in the course of transportation to a licensee holding licenses authorizing the sale of such distilled spirits; (c) distilled spirits the containers of which bear the stamps herein required to be attached thereto; (d) distilled spirits in United States government bonded warehouses.

Section 52. Every person who sells, serves or otherwise disposes of any alcoholic beverage, except beer which may be so sold, served, or disposed of, over or at any public bar or in any public barroom, for consumption on the premises, shall be guilty of a misdemeanor.

Section 53. Any person who fails, neglects or refuses to file any report required to be filed by this Act within ten days after the report is required to be filed, or who makes any false statement or conceals any material fact in any application for a license or in any record, report, affidavit or claim provided for herein, shall be guilty of a misdemeanor unless such act is by any other law of this State declared to be a felony, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars

nor more than one thousand dollars, or by imprisonment in the county jail not less than one month, nor more than six months, or by both such fine and imprisonment.

Section 54. No manufacturer, rectifier, distiller, bottler, importer or wholesaler or any officer, director or agent of any such person shall

(a) Hold the ownership, directly or indirectly, of any interest in any "on-sale" license;

(b) Furnish, give or lend any money or other thing of value, directly or indirectly, to, nor guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning or maintaining any "on-sale" premises where alcoholic beverages are sold for consumption on such premises;

(c) Furnish, give, rent, lend or sell, directly or indirectly, any equipment, fixtures or supplies, other than alcoholic beverage directly or indirectly to any person engaged in operating, owning or maintaining any "on-sale" premises where alcoholic beverages are sold for consumption on such premises, provided that this subdivision shall apply only to manufacturers, bottlers, importers or wholesalers of products of the brewing industry;

(d) Furnish, give, lend or rent directly or indirectly to any person any decorations, paintings or signs other than signs for interior use of not to exceed in area six hundred thirty square inches for use in or about or in connection with any premises where alcoholic beverages are sold for consumption on such premises, or pay money or any thing of value for the privilege of placing or painting a sign or advertisement, or window display on or in any premises selling alcoholic beverages at retail;

(e) Own any interest, directly or indirectly, in the business, furniture, fixtures, signs, except signs for interior use mentioned in subdivision (d) herein refrigeration, equipment or lease in or of any premises operated or maintained under any "on-sale" license for the sale of alcoholic beverages for consumption on the premises where sold; or

own any interest directly or indirectly, in realty hereafter acquired upon which such "on-sale" premises are maintained unless the holding of such interest is permitted in accordance with regulations of the board.

Any person violating any provision of this section shall be guilty of a misdemeanor and any holder of any retail "on-sale" or retail "off-sale" license who shall solicit the violation of the provisions of this section or accept or permit to be accepted on his behalf and with his consent any of the prohibited matters, articles or acts herein designated shall be guilty of a misdemeanor; provided, however, that the provisions of this section shall not apply to any equipment, fixtures or supplies furnished, given, lent or sold prior to the passage of this Act so long as such equipment, fixtures or supplies remain in the premises in which installed prior to such time, nor shall the provisions of this Act apply to carbonic acid gas or tapping accessories if sold at the reasonable open market value and the aggregate cost of tapping accessories furnished to any one person does not exceed $5.00 in any one calendar year.

Section 55. No sign or signs, which in whole or in part advertise any alcoholic beverage, and exceed in area seven hundred twenty square inches and no sign using the words "bar," "barroom," "saloon," "cocktail bar" or "lounge," or words of like or similar import, shall be maintained, erected, used or placed upon or adjacent to the outside of any building and in connection with any premises therein licensed to sell alcoholic beverages at retail for consumption on such premises.

Signs or other advertising matter used in connection with the licensed premises of any retailer of alcoholic beverages shall not be of any obnoxious, gaudy, blatant or offensive nature and shall in no manner contrary to the rules or regulations of said board obstruct the view of the interior of the premises from the street.

Each and every holder of an "on-sale" retail license who shall give, sell or otherwise dispense any draught beer, shall, upon the faucet, spigot or outlet wherefrom such beer is drawn, attach and keep posted a clear and legible notice,

placard or marker which shall in the English language indicate and declare the name or brand adopted by the manufacturer of such draught beer so given, sold or dispensed by such licensee, and which notice, placard or marker shall be so situated as to be clearly legible for a distance of at least ten (10) feet from such spigot, faucet or outlet to a person with normal vision, and such notice, sign or placard shall at all times be so situated as to be so clearly legible from the place where such "on-sale" licensee serves any customer or consumer of such beer, and provided further that if such faucet, spigot or other drawing device is in a location not within the room of the place of service and consumption of such beer, then, and in that event there shall also be kept posted a similar notice, placard or marker in the place of service and consumption of such beer which shall truthfully state and indicate only the kinds and brands of draught beer actually on sale in the premises of the "on-sale" licensee.

Any person who shall violate any of the provisions of this section, or who shall substitute another or different brand of draught beer from that indicated by any of the notices, placards or markers hereinabove provided for; or who shall substitute one brand of beer for another, or misrepresent the brand or kind of beer served to a consumer, shall be guilty of a misdemeanor for such violation or noncompliance. Any person who sells or otherwise disposes of, except for export, any draught beer containing more than three and two-tenths per cent of alcohol by weight and any person who sells or otherwise disposes of, except for export, any bottled beer containing more than four per cent of alcohol by weight, shall be guilty of a misdemeanor; provided, that this limitation shall not apply to the sale of ale, porter, brown and stout in bottles bearing labels properly describing the contents under any licenses, other than on-sale beer licenses, issued under this act or the State Liquor Control Act.

Section 56. Every person who employs or uses the services of minors in or on that portion of any premises which are used for the sale and service of alcoholic bever-

ages for consumption on the premises shall be guilty of a misdemeanor.

Section 57. It shall be unlawful for any person to pay or agree to pay any hostess, waitress, entertainer or other person a percentage of the receipts from sales of alcoholic beverages solicited or made by such hostess, waitress, entertainer or other person a salary or remuneration the amount of which is in any way dependent upon the amount or number of sales of alcoholic beverages solicited or made by such hostess, waitress, entertainer or other person. Provided, that this section shall not prohibit the holders of manufacturer's, rectifier's or wholesaler's licenses from employing and paying salesmen engaged in selling or soliciting sales for alcoholic beverages on a commission basis.

Every person who violates the provisions of this section shall be guilty of a misdemeanor.

Section 58. Every person who keeps or permits to be used or suffers to be used any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience or safety shall be guilty of a misdemeanor.

Section 59. Every on- or off-sale licensee who sells, gives away or furnishes any alcoholic beverage in any election district or precinct in any county in the State where an election is in progress, during the hours when by law the polls are required to be kept open for voting shall be guilty of a misdemeanor.

Section 60. Except as otherwise provided in this section, no person licensed to manufacture, import or wholesale any alcoholic beverage shall deliver or cause to be delivered any beer to or for any person holding an on-sale or off-sale license except between the hours of six a.m. and eight p.m. and no such delivery of any alcoholic beverage shall be made or caused to be made by any such licensee on

Sunday. Alcoholic beverages may be delivered at the platform of the manufacturing or distributing plant at any time. Every person violating the provisions of this section shall be guilty of a misdemeanor.

Section 61. Every person who sells, furnishes, gives, or causes to be sold, furnished or given away any alcoholic beverage to any person under the age of twenty-one years shall be guilty of a misdemeanor; provided, that this section shall not apply to the parents or guardians of such persons under twenty-one years of age.

Section 62. Every person who sells, furnishes, gives or causes to be sold, furnished or given away, any alcoholic beverage to any habitual or common drunkard shall be guilty of a misdemeanor.

Section 63. Every person, not authorized by law, who brings into any State prison, town or county jail, or city and county jail, or reformatory in this State or within the grounds belonging to any such institution any alcoholic beverage of any kind whatsoever shall be guilty of a felony.

Section 64. Every person who sells, gives or delivers to any other person any alcoholic beverage at any public schoolhouse or upon any portion of the grounds thereof shall be guilty of a misdemeanor. Any person convicted of a violation of this section shall, in addition to the penalty imposed for the misdemeanor, be barred from having or receiving any privilege of the use of public school property which is accorded by Chapter II of Part III of Division VI of the School Code of this State.

Section 65. Every person convicted of a misdemeanor for a violation of any of the provisions of this Act for which another punishment is not specifically provided for herein, shall be punished by a fine of not more than five hundred dollars or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

All fines and forfeitures imposed for a violation of this Act and collected in any court, except police courts, city justices' courts, city courts, and recorders' courts of cities or towns, must be paid to the county treasurer of the county in which the court is held; provided, that all fines and forfeitures collected in any police court, city justice's court, city court, or recorder's court, of any city or town that is maintained and the salaries of the officers thereof paid by the city shall be paid to the city treasurer of the city in which such court is located, excepting, however, all forfeitures collected by the judge of any of said courts when sitting as a committing magistrate.

Section 66. Every person convicted of a felony for a violation of any of the provisions of this Act for which another punishment is not specifically provided for herein, shall be punished by a fine of not more than five thousand dollars or by imprisonment in the State penitentiary for not less than one year nor more than five years or by both such fine and imprisonment.

Section 67. It is hereby declared that this Act shall not apply to the manufacture, sale or use of completely denatured ethyl alcohol or special denatured ethyl alcohol, as these substances are defined in the various statutes and regulations of the United States government relating thereto.

Nothing in this Act shall be deemed to prevent or restrict the use of tax-free ethyl alcohol under regulation of the Treasury Department of the United States government by any governmental agency, State or Federal, or any scientific university or college of learning or any laboratory for use exclusively in scientific research or to any hospital or sanitarium.

Nothing in this Act shall be deemed to prevent or restrict the use of tax-free alcohol or of industrial alcohol or other distilled spirits or wine under regulation of the United States government in the manufacture of medicinal pharmaceutical, or antiseptic products, including prescriptions compounded by retail druggists; of toilet products,

of flavoring extracts, sirups, of food products, of scientific, chemical, or industrial products; provided such products are unfit for beverage use.

Section 68. The State Liquor Control Act, Chapter 658, Statutes of 1933, and Chapter 178, Statutes of 1933, shall remain in effect until July 1, 1935, after which date said acts shall no longer be of any force and effect; provided, that any taxes imposed pursuant to Chapter 178, Statutes of 1933, prior to said date shall remain fully collectible.

Section 69. The following acts and sections, together with all amendments thereof and all acts supplementary thereto, are repealed.

Year	Chapter	Page	Year	Chapter	Page
1855	188	240	1895	156	161
1858	232	193	1903	240	319
1860	223	186	1905	26	20
1871-72	188	231	1905	123	126
1873-74	13	12	1907	104	127
1873-74	27	27	1909	413	722
1873-74	198	297	1911	351	599
1873-74	300	434	1915	21	20
1873-74	345	509	1921	80	79
1875-76	473	691	1925	89	221
1880	83	80	1933	51	340
1889	241	352	1933	149	598
1891	87	91			

Penal Code Sections.

63b 397b 680

Political Code Sections.

3381
3383

School Code Sections.

3.80
3.81

Section 70. If any section, subsection, clause, sentence or phrase of this Act which is reasonably separable from

the remaining portion of this Act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this Act. The Legislature hereby declares that it would have passed the remaining portions of this Act, irrespective of the fact that any such section, subsection, clause, sentence or phrase of this Act be declared unconstitutional.

Section 71. This Act, inasmuch as it provides for tax levies for the usual current expenses of the State, shall, under the provisions of Section 1 of Article IV of the Constitution, take effect immediately.

Approved, June 13, 1935.

APPENDIX B

I. FORM OF WEBB-KENYON ACT AS ORIGINALLY PROPOSED.

Senate Bill 4043 (62nd Cong., 3rd Sess.), the original Bill introduced in the Senate embracing the subject dealt with in the Webb-Kenyon Act, was first before the Senate for debate on December 16, 1912. In introducing the Bill for debate it was said:

Mr. Sanders. Mr. President, Senate bill 4043, entitled "A bill to prohibit interstate commerce in intoxicating liquors in certain cases," stripped of its verbiage would read:

> *Be it Enacted,* That the shipment of intoxicating liquor from one State into any other State by any person, to be received or used in violation of any law of such State, is hereby prohibited.
>
> Sec. 2. That all intoxicating liquors transported into any State shall, upon arrival within the boundaries of such State and before delivery to the consignee, be subject to the operation of the laws of such State.

This bill relates to nothing but the shipment of intoxicating liquors from one State into another State where it is to be sold in violation of State laws concerning same.

(Volume 49, Congressional Record, page 699)

II. DEBATES STRESSING OBJECT OF BILL AS AN AID TO STATES IN EXERCISE OF POLICE POWER.

Senator Kenyon's Views on Object and Effect of Bill.

Mr. Kenyon. Now, I think no lawyer who is honest with himself and perfectly frank will deny that there are very close constitutional questions involved in this bill, and especially as to section 2. Every forward measure must run the gauntlet of constitutional objection.

The evil which this bill seeks to strike at is apparent, and the purpose, it seems to me, is commendable. *In its ultimate analysis the bill is simply to permit the States to exercise their reserved police power without interference by the Federal Government; in other words, to subject interstate commerce in certain articles to the laws of the several States.* (Italics ours.) This Government is one of delegated powers. It has been asserted by constitutional writers of great eminence that one of the incentive reasons for the adoption of the Constitution was to give free channels to commerce and not permit the States by various regulations to block commerce.

The power of the State in its reserved police power is one which Congress does not give and is one which Congress can not take away. It can not add one particle to or detract one iota from the police power of the States. These powers belong to the States; the right to make such laws concerning the health, life, and safety of its citizens as its legislative power in its wisdom may determine. This is just as much a right in the State as the constitutional right to regulate commerce is in Congress. The "police power zone" of the State, if such an expression might be used, may at times lap over and intrude upon the "interstate commerce zone" of the Federal Government. If such conflict ever does arise, the Federal Government, of course, is supreme.

This bill if enacted would not be a law to bring about prohibition. It would not be a law to stop personal use of intoxicating liquors, nor to prohibit the shipment of intoxicating liquors for personal use, nor to stop the use of intoxicating liquors for sacramental purposes. *Its purpose, and its only purpose, is to remove the impediment existing as to the States in the exercise of their police powers regarding the traffic or control of intoxicating liquors within their borders.*

It is the spirit of our times and the genius of our institutions that each State should exercise its police power free from the impediments that might spring from a narrow construction of the interstate commerce clause. Where a State has determined that intoxicating liquors shall not be

manufactured or sold within its borders, is it not manifest that the citizens of other States should not be granted greater privileges in that State than its own citizenship enjoy? (Italics ours.)

(Volume 49, Congressional Record, page 707)

Mr. Sherley's views.

Mr. Sherley. Man after man has stood on the floor here saying, "This bill is simply to give to the State additional power of control." I say to you that whatever power a State has over any subject within its domain is not because of the Constitution of the United States, and no act of Congress can grant any power to it that it does not already have. We live under a government of delegated powers. Certain powers have been delegated to the States, certain to the Nation, and certain reserved to the people, and delegated neither to the State nor to the Nation. The power that the Federal Government has over interstate commerce is plenary. It is absolute within the limits of the Constitution, and Congress can not by all the declarations under the sun convey to any single State the slightest power that that State does not now have.

(Volume 49, Congressional Record, page 2841)

Mr. Mondell's views.

Mr. Mondell. What the legislation does is to subject certain articles in interstate commerce to the police power of the State in order that the State authorities may determine whether they are to be received, possessed, sold, or in any manner used in violation of the law of the State.

(Volume 49, Congressional Record, page 2837)

Mr. Houston's views.

Mr. Houston. It is but aiding local option, with the State as the unit, and I think that all agree that the control of the liquor traffic belongs to the States and that the State in its exercise of its police power in local self-government should be aided as much as it is possible for Congress to aid it.

(Volume 49, Congressional Record, page 2824)

Mr. Paynter's views.

Mr. Paynter. Therefore, Mr. President, when it is stated in the bill under consideration (or the Wilson bill) that an article at a certain time shall be subject to the police power of a State the Congress can not thereby add to the police power of the State. Such a statement, if viewed from a Constitutional aspect, can not extend the police power of the State. It would be more accurate, I think, if Congress should say that the interstate shipment was terminated upon delivery of the article. Then there would be no reference made to the police power of the State and would not appear by words that Congress was endeavoring to add to the police power of the State. This would be better, as Congress can neither confer upon or diminish the police power of the State. In my opinion it is very inaccurate to make a declaration that at a certain period it shall be within the police power of the State, *because when the shipment is terminated the police power of the State takes hold and control of the article that is shipped.* (Italics ours.) So, as I say, it is very misleading to make a statement of that kind in the bill. It is not constitutionally accurate. It is not the province of Congress to define the police power of the States. It is the province of Congress to make uniform rules to regulate commerce; not, however, to confer such power upon the States.

(Volume 49, Congressional Record, pages 2689, 2690)

III. DEBATE RELATING TO CONSTITUTIONALITY OF SECOND SECTION AND REASONS FOR ITS ELIMINATION.

Views on Constitutionality of Second Section.

Senator McCumber. I had stated, if the Senator will pardon me, when he first called my attention to it, that I doubted the constitutionality of section 2 and that I did not see the necessity of it. It was no part of the bill when it was introduced, but is a committee amendment. I think it is rather dangerous than beneficial. It may be open to

the construction that it is a delegation of congressional authority.

(Volume 49, Congressional Record, pages 702-3).

Senator Kenyon's views.

Senator Kenyon. The real difficulty with section 2 is this: The section recognizes the transportation of liquors into the State and then permits the operations of the police power that might stop the liquor at the State line, thus keeping it out of interstate commerce. The first section takes certain liquor out of commerce and the second section seems to recognize it as being in. There is some incongruity in this. That is the proposition on which I have had great difficulty in harmonizing my views.

(Volume 49, Congressional Record, page 830)

Mr. Paynter's views.

Mr. Paynter. Section 2 is inconsistent with section 1, as this section allows intoxicating liquor to be seized upon arrival in a State, regardless of the question of intent of those who had a direct or indirect interest in it.

(Volume 49, Congressional Record, pages 2687, 2688)

Mr. Borah's views.

Mr. Borah. My object in the first place was to discuss principally the second section of the bill. I do not believe the second section of the bill is constitutional. I believe it establishes a different rule and involves a different principle from that which is involved in the first section, and it was my purpose to state why I entertain that view. I shall not do so, however, in view of the fact that I understand the parties in charge of the bill are going to offer as a substitute for this bill the one that passed the house known as the Webb bill, and which is in effect the first section of this bill.

Assuming that probably the substitute will prevail, I am not going to take time to state why it seems to me the second section is inhibited by the provisions of the Constitution. I could not and shall not vote for this section

in any event—entertaining the view which I do as to its unconstitutionality.

(Volume 49, Congressional Record, page 2919)

Mr. Kenyon's views.

Mr. Kenyon. Mr. President, a bill was passed in the House known as the Webb bill. An attempt has been made to substitute that bill to-day for what is commonly known as the Kenyon-Sheppard bill. That has not been successful, but a motion will be made by the Senator from New Hampshire [Mr. Gallinger] to strike out all after the enacting clause and insert in lieu thereof the words of the Webb bill. I very much hope that that motion may prevail.

(Volume 49, Congressional Record, page 2920)

IV. DEBATE EVIDENCING DIVERGENCE OF VIEWS IN RESPECT TO CONSTITUTIONALITY OF BILL.

Mr. Kenyon's Views.

Mr. Kenyon. Senator Nelson, of Minnesota, in his report some years ago to Congress on this question, stated that matter from that standpoint so clearly that I use his language. He said:

> Under the Wilson law the Federal Government relinquished a portion of its control over interstate commerce, and under the proposed legislation it proposes to relinquish an additional portion. In neither case is there a delegation to the State; in both cases it amounts merely to a declaration on the part of Congress that interstate commerce in intoxicating liquors shall only be free to the extent that it does not interfere with or embarrass the police power of the state. * * *

Mr. Sutherland's Views.

Mr. Sutherland. Interstate transportation, as I understand, begins when the article is delivered by the consignor.

in the State from which it is shipped and ends, and only ends, when it is delivered to the consignee in the State to which it is shipped. Now, if Congress may divest an article of its interstate character and surrender to the State the power to regulate it and deal with it as it pleases immediately after it has crossed the line of the State in which it is shipped, may it not, by the same reasoning, surrender the power to the State from which the article is shipped until the time it reaches the State line? If that be true, would it not result in Congress surrendering to the two States the whole power of interstate commerce?

Mr. Nelson's Views.

Mr. Nelson. The Senator from Utah (Mr. Sutherland) fails to state the entire proposition in its integrity. The Supreme Court, in the case of Leisy against Hardin, held that interstate commerce extended until the consignee had disposed of the goods in the original package; and in the case of Rahrer, under the Wilson law, the Supreme Court held that Congress had relinquished its power over a part of interstate commerce, to wit, the sale of the unbroken package.

In that case the Supreme Court held that it was not a delegation of legislative authority, but that under the terms of the Wilson law the goods had not arrived within the State until delivery to the consignee. In the case of Leisy against Hardin the Supreme Court decided that the sale by the consignee in the unbroken package to the retail trade was a part of interstate commerce, and just as much subject to the protection of Congress as the transit by rail to the point of destination. In that case Congress chopped off a part of interstate commerce; it chopped off the sale in the unbroken package; and in section 2 of this bill it is simply proposed to go a step further. So that the question propounded by the Senator from Utah did not cover the whole case; it did not cover one part of interstate commerce that was eliminated by the Wilson law.

Mr. Sutherland. Let it cover that element, then, and then does the Senator from Minnesota say that Congress

has the power to surrender to the State in which the shipment originates the power to regulate it until it reaches the State line?

Mr. Nelson. There was a surrender in that case of a part of interstate commerce, and there is no reason why Congress can not surrender another portion. The question of the delegation of legislative authority was discussed by the court in the *Rahrer* case, and the court held that there was no delegation of legislative authority.

* * * * * * * * *

Mr. McCumber. I think the Senator agrees with me that the only way we can sustain the constitutionality of section 2 is on the assumption that Congress has divested the article of its interstate character the moment that it crosses the line. Do I correctly understand that to be the Senator's position?

Mr. Kenyon. I agree with the Senator from Minnesota that a strong argument can be made under the *Rahrer* case, and in the language of the court in the *Leisy* case, that the interstate feature may be removed some time in the journey.

Mr. McCumber. That is correct.

Mr. Kenyon. I do not myself so argue.

Mr. McCumber. That is correct; but it must be in the act itself which divests it of its interstate character.

Mr. Kenyon. That is done by section 1.

Mr. McCumber. I have no doubt of the authority of Congress to divest it of its interstate character.

Mr. Kenyon. I have no doubt of that.

Mr. McCumber. But as section 2 now appears is it not open to the possibility, at least, of a construction that it is not a delegation of authority and that there is no attempt to really divest it of its interstate character; and could we not cure that by a simple amendment, such as was suggested by Senator Edmunds in the argument which you have just read, by a clear and definite declaration that it shall cease to be an object of interstate commerce the moment it crosses the State line? With that declaration, I believe that the constitutionality of it may properly be sustained. * * * (Vol. 49, Congressional Record, pp. 829, 830.)

APPENDIX C

PRESIDENT TAFT'S VETO MESSAGE.

To the Senate:

I return herewith, without my signature, S. 4043.

The bill, including title and enacting clause, is as follows:

An Act divesting intoxicating liquors of their interstate character in certain cases.

> *Be It Enacted,* etc., That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package, or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, is hereby prohibited.

After giving this proposed enactment full consideration, I believe it to be a violation of the interstate commerce clause of the Constitution, in that it is in substance and effect a delegation by Congress to the States of the power of regulating Interstate commerce in liquors which is vested exclusively in Congress.

The most recent expression of the Supreme Court on the general subject is found in the case of the *Louisville & Nashville Railroad Co.* v. *F. W. Cook Brewing Co.* (223 U. S. 70). This was a bill in equity to enjoin the railroad company from refusing to accept the product of the brewing company at Evansville, Ind., where it was located, for transportation to local-option or so-called "dry communities" in Kentucky. In delivering the judgment of the Supreme Court, affirming the action of the circuit court in awarding the injunction asked, Mr. Justice Lurton said:

> "By a long line of decisions, beginning even prior to *Leisy* v. *Hardin* (135 U. S. 100) it has been indisputably determined:
>
> a. That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce.
>
> b. That it is not competent for any State to forbid any common carrier to transport such articles from a consignor in one State to a consignee in another.
>
> c. That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to State regulation, restraining their sale or disposition.
>
> The Wilson Act, which subjects such liquors to State regulation although still in the original packages, does not apply before actual delivery to such consignee where the shipment is interstate. Some of the many later cases in which these matters have been so determined and the Wilson Act construed are: *Rhodes* v. *Iowa* (170 U. S. 412); *Vance* v. *Vandercook Co.* (170 U. S. 438); *Heyman* v. *Southern Railway* (203 U. S. 270); *Adams Express Co.* v. *Kentucky* (214 U. S. 218).
>
> Valid as the Kentucky legislation undoubtedly was as a regulation in respect to intrastate shipments of such articles, it was most obviously never an effective enactment in so far as it undertook to

> regulate interstate shipments to dry points. Pending this very litigation, the Kentucky Court of Appeals, upon the authority of the line of cases above cited, reached the same conclusion, *C. & N. O. Ry.* v. *Kentucky* (126 Ky. 563).
>
> The obligation of the railroad company to conform to the requirements of the Kentucky law, so far as that law prohibited intrastate shipments, is clear, and to this extent its circular notification was commendable. But the duty of this company, as an interstate common carrier for hire, to receive for transportation to consignees upon its line in Kentucky from consignors in other States any commodity which is an ordinary subject of interstate commerce, and such transportation could not be prohibited by any law of the State of such consignee, inasmuch as any such law would be an unlawful regulation of interstate commerce not authorized by the police power of the State.

The Wilson Act, referred to by Judge Lurton, provides as follows:

> That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

The Supreme Court, in *Rhodes* v. *Iowa* (170 U. S. 423), construed this language to mean that the legislative authority of the respective States should attach to intoxicating liquors coming into the States by an interstate shipment,

only after the consummation of the shipment, but before the sale of the merchandise. The court held that the right of the consignee to sell before delivery was a mere incident to the shipment, and that it was within the power of Congress to submit the incidental power to sell to the dominion of State authority.

The court declined to express an opinion as to the authority of Congress under its power to regulate commerce to delegate to the States the right to forbid the transportation of merchandise from one State to another. It must be admitted, therefore, that upon the exact point in question, to wit, the right of the Congress to delegate to States the power to forbid the shipment of intoxicating liquors from another State into its jurisdiction, the Supreme Court has declined to express an opinion, though it is difficult to read the language of the court in the case of *Rhodes* v. *Iowa* (170 U. S. 412); *Vance* v. *Vandercook Co.* (170 U. S. 438), and of Mr. Justice Catron in the License Cases (5 Howard, 504, 599) quoted with approval by Mr. Justice Matthews in *Bowman* v. *Railway Co.* (125 U. S. 465, 489) without inferring that such a delegation of power would be beyond the power of Congress.

One of the main purposes of the union of the States under the Constitution was to relieve the commerce between the States of the burdens which local State jealousies and purposes had in the past imposed upon it; and the interstate-commerce clause in the Constitution was one of the chief reasons for its adoption. The power was there conferred upon Congress. Now, if to the discretion of Congress is committed the question whether in interstate commerce we shall return to the old methods prevailing before the Constitution or not, it would seem to be conferring upon Congress the power to amend the Constitution by ignoring or striking out one of its most important provisions. It was certainly intended by that clause to secure uniformity in the regulation of commerce between the States. To suspend that purpose and to permit the States to exercise their old authority before they became States, to interfere with commerce between them and their neighbors, is to defeat the constitutional purpose.

This conclusion is sustained in a very careful report prepared by the subcommittee of the Judiciary Committee of the Senate, of which then Senator Knox was chairman. The conclusions stated were as follows:

> First. Interstate shipments are not completed until they reach the consignee.
>
> Second. An interruption or interference with interstate shipments before they reach the consignee constitutes a regulation of commerce.
>
> Third. Regulating interstate shipments is an exclusive function of Congress.
>
> Fourth. Congress cannot delegate any part of its exclusive power to the States.
>
> Fifth. To remove the bar or impediment of exclusive federal power which shuts the States out of the federal domain is to permit or sanction a state law in violation of the Constitution and in effect to delegate a federal function to the States.

I am quite aware that the purpose of this act is to enable the States more completely to regulate the sale and use of intoxicating liquors in their respective jurisdictions, and that a very large part of the good people of each of such States is strongly in favor of any law which will permit the State to do this, and therefore, that the necessity for maintaining the Constitutional restrictions in such cases with reference to interstate commerce is not looked upon with popular favor in those States. Recognizing this popular wish, Congress has already gone to the extent of subjecting the original package in which the liquor is imported to the laws of the State as soon as it is delivered into the hands of the consignee. It has regulated the commerce in liquors by forbidding, under sections 238, 239, and 240 of the Penal Code (1) delivery of intoxicating liquor to any person other than the consignee, unless upon his written order, or to any fictitious person; (2) the collection of the purchase price of intoxicating liquor by any common carrier acting as agent of buyer or seller; (3) the shipment of any

liquor unless labeled on the outside to show name of consignee, nature of contents, and quantity contained. These restrictions must greatly aid the State authorities in their enforcement of their liquor laws.

If Congress, however, may in addition entirely suspend the operation of the interstate-commerce clause upon a lawful subject of interstate commerce and turn the regulation of interstate commerce over to the States in respect to it, it is difficult to see how it may not suspend interstate commerce in respect to every subject of commerce wherever the police power of the State can be exercised to hinder or obstruct that commerce. I can not think that the framers of the Constitution, or that the people who adopted it, had in mind for a moment that Congress could thus nullify the operation of a clause whose useful effect was deemed so important and which in fact has contributed so much to the solidarity of the Nation and the prosperity that has followed unhampered, nation-wide trade.

But it is said that this is a question with which the Executive or Members of Congress should not burden themselves to consider or decide. It is said that it should be left to the Supreme Court to say whether this proposed Act violates the Constitution. I dissent utterly from this proposition. The oath which the Chief Executive takes, and which each Member of Congress takes, does not bind him any less sacredly to observe the Constitution than the oaths which the Justices of the Supreme Court take. It is questionable whether the doubtful constitutionality of a bill ought not to furnish a greater reason for voting against the bill, or vetoing it, than for the court to hold it to be invalid. The court will only declare a law invalid where its unconstitutionality is clear, while the law maker may very well hesitate to vote for a bill if of doubtful constitutionality because of the wisdom of keeping clearly within the fundamental law. The custom of legislators and executives having any legislative function to remit to the courts entire and ultimate responsibility as to the constitutionality of the measures which they take part in passing is an abuse which tends to put the court constantly in opposition to the legislature and executive, and, indeed, to the popular supporters of uncon-

stitutional laws. If, however, the legislators and the executives had attempted to do their duty this burden of popular disapproval would have been lifted from the courts, or at least considerably lessened.

For these reasons, and in spite of the popular approval of this bill, I have not felt justified in signing it, because I feel that under principles of proper constitutional construction it violates the interstate-commerce clause of our fundamental law.

I am sustained in the view I have taken by the judgment and opinion of Attorney General Wickersham, which contains an elaborate discussion of the question and considers in detail the issues which have been raised in the Congressional debates and elsewhere.

WM. H. TAFT

The White House, February 28, 1913.

(Volume 49, Congressional Record, page 4291)

APPENDIX D

DEBATES ON PROPOSED 21st AMENDMENT SETTING OUT MORE FULLY THE SUBJECTS CONCERNING WHICH EXCERPTS ARE QUOTED IN APPELLANT'S BRIEF.

That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several states:

"ARTICLE —

"Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"Sec. 3. Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.

"Sec. 4. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

(76 Congressional Record, page 4139)

* * * * * * * * *

By Mr. Blaine:

"Section 1 is a straight, outright repeal of the eighteenth amendment. Section 1, if it is incorporated in

the joint resolution, submitted by the Congress, and ratified by the necessary States, will entirely eliminate the eighteenth amendment from the Constitution. I need not discuss that section.

"Then we have suggested and offered section 2, which provides as follows:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited.

"Mr. President, in agreeing to that section I think the committee was unanimous that the language used would effectuate the purpose that is obviously designed by section 2. It is claimed, however, and I think with some degree of assurance for the future, that Congress now has the power to pass laws to protect the so-called dry States in regulation of interstate commerce over intoxicating liquors. A great many laws on that subject have been enacted.

"I will not review those laws in detail. First, however, we had what is known as the Wilson law. That law was treated in the case of *Rhodes* v. *Iowa* (170 U. S. 412); but the Supreme Court in that case gave rather a restricted construction of the language used by the Congress, and held that under the Wilson Act the interstate character attached to the liquor until it had actually been delivered to the consignee. In other words, the court held that the interstate-commerce clause—that is, the power of Congress to regulate interstate commerce—attached to that commodity not only before it entered the State but after it entered the State so long as it was in process of transportation either by rail, by express, or by any other method, until the commodity or the intoxicating liquor was in fact delivered to the consignee.

Then came an amendment to the Wilson Act, known as the Webb-Kenyon Act. The Webb-Kenyon Act was interpreted by the Supreme Court of the United States in the case of *Clark Distilling Co.* v. *Western Maryland Railway Co.* (242 U. S. 311). The language of the Webb-Kenyon Act was designed to give the State in effect power

of regulation over intoxicating liquor from the time it actually entered the confines of the State; and the Supreme Court held that it was following the doctrine laid down in the case of Rhodes against Iowa, and necessarily must follow that doctrine in order to sustain the decision it was making in the case of Clark against Maryland Railway Co.

Mr. Wagner. Mr. President, will the Senator yield?

Mr. Blaine. I see my able friend from New York shaking his head. I yield to him.

Mr. Wagner. I do not want to enter into a controversy, because it really is not very important, but I do not think the Senator meant to say that by this act Congress delegated to the States the power to regulate interstate commerce; Congress itself regulated interstate commerce to the point of removing all immunities of liquor in interstate commerce.

Mr. Blaine. I thank the Senator. I think he has given the correct statement of the doctrine. My understanding of the question was identically the same—that it was the action of the Congress of the United States in regulating intoxicating liquor that protected the dry State within the terms of the law passed by the Congress.

Then, following the Webb-Kenyon Act, was the Reed "bone dry" amendment. That went somewhat further. I need not discuss that. That amendment was sustained by the Supreme Court in the case of *United States* v. *Hill* (248 U. S. 420).

In the case of Clark against Maryland Railway Co. there was a divided opinion. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.

Mr. President, the pending proposal will give the States that guarantee. When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States,

in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor. In other words, the State is not surrendering any power that it possesses, but rather, by reason of this provision, in effect acquires powers that it has not at this time.

The committee felt that since the Congress had acted and had definitely legislated upon this question, while that legislation had been sustained by the Supreme Court, yet it was sustained by a divided court, and that we could well afford to guarantee to the so-called dry States the protection designed by section 2.

I am opposed to the dry States interfering with the so-called wet states in connection with this question of intoxicating liquor; and so, by the same token, I am willing to grant to the dry States full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors.

(76 Congressional Record, pages 4140, 4141)

* * * * * * * * *

Mr. Blaine. Mr. President, my own personal viewpoint upon section 3 is that it is contrary to section 2 of the resolution. I am now endeavoring to give my personal views. The purpose of section 2 is to restore to the States by constitutional amendment obsolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States. The State under section 2 may enact certain laws on intoxicating liquors, and section 2 at once gives such laws effect. Thus the States are granted larger power in effect and are given greater protection, while under section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment. My view therefore is that section 3 is inconsistent with section 2, and the two sections are incompatible, and that section 3 ought to be taken out of the resolution. I made myself clear before the subcommittee and before the full committee, and made a reservation to that effect.

(76 Congressional Record, page 4143)

* * * * * * * * *

Mr. Fess. I think the Senator has answered my question, but he goes farther than I feel free to go. In other words, the second section of the joint resolution that is now before us is designed to permit the Federal authority to assist the States that want to be dry to remain dry. I am in favor of that. The third section is intended to give authority to the Federal Government to prevent the return of the saloon to the extent of regulating or prohibiting the drinking of liquor on the premises where the sale is made. * * *

(76 Congressional Record, page 4168)

* * * * * * * * *

Mr. Walsh of Montana. I wish to say a word, in view of what has just been stated by the Senator from Florida in relation to the second paragraph of the joint resolution as tendered by the committee.

It is true that the original Constitution authorizes Congress to prohibit the transfer of intoxicating liquors in interstate commerce. It is held, however, that that authority simply indicates the intention to have commerce free except as Congress may otherwise direct. It has been held that under the existing Constitution the right obtains on the part of any citizen to pass his goods into another State, and they remain under the protection of the Federal Constitution until they actually reach the hands of the consignee; so that they can not be stopped at the State line nor there fall under the jurisdiction of the State authorities, but the goods will not fall under the jurisdiction of the State authorities until they actually get into the possession of the consignee who may live in the center of the State. Meanwhile all manner of opportunity is afforded for the diversion of the intoxicating liquors from the consignee to whom they are addressed. Likewise, even then, the intoxicating liquor is protected by the commerce clause; if it remains on the siding in the car of the transportation company, it still remains under that protection, and if it goes into a warehouse belonging to the transportation company it remains under the protection of the Federal statute, and is immune from any control by State statutes until it actually reaches the possession of the consignee. The purpose of

the provision in the resolution reported by the committee was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of the consignee as well as thereafter. It was so decided in a case reported in One hundred and seventieth United States Reports, with which, I think, the profession generally is not particularly familiar.

Mr. Glass. Mr. President, in my own interpretation of the resolution as I have presented it, there can be no consignee of intoxicating liquors in a dry State. Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but the resolution as I have drafted it prohibits the shipment of intoxicating liquors into a State whose laws prohibit the manufacture, sale, or transportation of liquors. So I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors; but there can be no consignee in dry territory under the terms of my proposed amendment to the Constitution.

Mr. President, at every point in the presidential campaign when submission of this question was discussed, and whenever the objection was raised as to the return of the saloon, assurances were given that both parties, with unexampled unanimity, were opposed to the return of the saloon. The Democratic national platform, in spirit and by suggestion—indeed, by denunciation—objected to the return of the saloon. The Republican platform in text insisted upon a constitutional guaranty against the return of the saloon. So my joint resolution complies with both the Democratic and the Republican platforms; and that is the only way you are ever going to get the question submitted at all, as it requires a two-thirds vote. Moreover, not only is it the only way you are ever going to get it submitted but it is the only way you are ever going to get it ratified by 36 States of the Union.

(76 Congressional Record, page 4219)

* * * * * * * * *

Mr. Reed. May I preface the question by saying that I am in sympathy with every word the Senator has thus far uttered on this subject.

A good many Senators are obviously bothered by the continuance of Federal control in this matter; and while they are anxious to see the saloon outlawed, they would like to see it done by prohibition on State action rather than continuing this unsuccessful Federal effort to carry its police power into the States. I am wondering whether the Senator feels that the last sentence in section 1 of his amendment is essential. That is the one which gives concurrent power to Congress.

Mr. Glass. No; I do not think it is essential. If I could be brought to believe that the joint resolution stands a better chance of passage by the elimination of that sentence, I should be glad to eliminate it, because the balance of the joint resolution gives us a constitutional prohibition against the return of the saloon.

Mr. Reed. That is just what I want to see; and the question of the Senator from Florida (Mr. Fletcher) a little while ago seemed to be animated by the same thought I had—that there are many votes that would be secured for the joint resolution if that grant of concurrent power to Congress were eliminated.

Mr. Glass. That being so, I should be perfectly willing to eliminate that one sentence from the measure. All I want is a constitutional guaranty against the return of this abominable saloon system of dispensing intoxicating liquors—that is all—and if we write it into the Constitution I assume that no State would ever even undertake to violate the text of the Constitution by licensing a saloon.

Mr. Reed. Obviously, if it did, its licensing law would be invalid.

(76 Congressional Record, page 4220)

APPENDIX E

RETALIATORY BILLS AND LAWS.

ILLINOIS.

Senate Bill No. 328, introduced by Monroe, reads as follows:

A BILL For an Act to add Section 2a to Article VI of "An Act relating to alcoholic liquors," approved January 31, 1934, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 2a is added to Article VI of "An Act relating to alcoholic liquors," approved January 31, 1934, as amended, the added section to read as follows:

ARTICLE VI.

Sec. 2a. No license shall be issued to a distributor to import beer manufactured in any State, the laws or rules or regulations of which have the effect of discriminating against the sale in such State of beer manufactured in Illinois.

KENTUCKY.

House Bill No. 42XXX, introduced by Gnau, April 18, 1936, reads as follows:

AN ACT relating to revenue and taxation and declaring an emergency.

Be It Enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. When by the laws of any other state any tax, fee, fine or penalty of any sort whatever is imposed

on any goods produced in Kentucky, greater than that imposed upon the same or similar goods produced in such other state, then the same tax, fee, fine, or penalty is hereby imposed on any goods produced in such other state and sent or imported into Kentucky.

Section 2. This tax is not intended to apply to goods or articles in interstate commerce and they are hereby expressly excluded from the provisions of this Act.

Section 3. The Department of Revenue of the Commonwealth of Kentueky is hereby charged with the enforcement of this Act and it shall have all power necessary to such enforcement in the collection of the taxes herein provided, including the institution of legal proceedings, and to promulgate such rules and regulations and preseribe such forms as it may deem necessary for the enforcement of this Act.

Section 4. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Section 5. Whereas, the Commonwealth of Kentucky is sorely in need of revenue for the maintenance of the several necessary branches of government, an emergency is hereby declared to exist and this Act shall become effective from and after its passage and approval by the Governor.

Ohio.

Chapter 15, Ohio General Code, Section 6064-67, (Liquor Control Act, 1935), provides as follows:

Sec. 6064-67.—If the laws of another state, territory or nation, or the rules and regulations of an administrative body therein, provide for or authorize the levy and collection of taxes, fees and charges upon or against the products of Ohio manufacturers of wine or manufacturers or brewers of beer and other malt liquors when such products are sold in, delivered or shipped into such state, territory or nation,

or any part thereof, in excess of the taxes, fees and charges levied and collected on the products of manufacturers or brewers of said state, whether such taxes, fees and charges are in the nature of an excise, sales or import tax, or by whatever name designated, the tax commission of Ohio is hereby authorized, and shall levy and collect additional taxes, fees, and charges on the products of manufacturers of wine or manufacturers and brewers of beer and other malt liquor of said state, territory or nation when sold in, delivered or shipped into this state, as hereinafter provided.

PENNSYLVANIA.

Public Law No. 15, Pennsylvania Liquor Control Act, (1933) (As Amended and reenacted by Act of July 18, 1935, Act No. 399), provides as follows:

Sec. 201. General Powers of Board.— * * *

* * * * * * * * *

(b) The board shall require each Pennsylvania manufacturer and each non-resident manufacturer of distilled liquors selling distilled liquors to the board, which are not manufactured in this Commonwealth to make application for, and be granted, a permit by the board before distilled liquors, not manufactured in this Commonwealth, shall be purchased from such manufacturer. Each such manufacturer shall pay for such permit a fee which, in the case of a manufacturer of this Commonwealth, shall be equal to that required to be paid, if any, by a manufacturer of of the State, territory, or country of origin of the distilled liquors, for selling liquors manufactured in Pennsylvania; and in the case of a non-resident manufacturer, shall be equal to that required to be paid, if any, in such State, territory, or country by Pennsylvania manufacturers doing business in such State, territory or country. In the event that any such manufacturer shall, in the opinion of the board, sell, or attempt to sell, distilled liquors to the board through another person, for the purpose of evading this provision relating to permits, the board shall require such

person before purchasing distilled liquors from him or it to take out a permit, and pay the same fee as hereinbefore required to be paid by such manufacturer. All permit fees so collected shall be paid into the State Stores Fund;

TEXAS.

The Texas Liquor Control Act, (Laws 1935, Second Special Session, Approved November 15, 1935) Article II, Section 5(g) provides:

Sec. 5. License fees and regulations. * * *

* * * * * * * * *

(g) There shall be levied and collected by the Board on all beer placed in warehouses or stored in this State an inspection fee at the rate of Fifty Cents (50c) per barrel; provided that any manufacturer of this State who shall have during the current year paid for a manufacturer's license under this Act shall be exempt from payment of the inspection fee; provided, however, that this inspection tax shall not be levied upon beer manufactured in a state that does not levy a similar tax upon beer manufactured in Texas and sold in such state.

APPENDIX F

ANALYSIS OF DISTRICT COURT OPINIONS RENDERED BY THREE-JUDGE COURTS SINCE ADOPTION OF TWENTY-FIRST AMENDMENT.

Appellants state in argument that since the adoption of the Twenty-first Amendment, the question presented by this appeal has been before district courts in eight different cases, and by some process of reasoning conclude that of the eight decisions the question has been determined favorably to appellants' position in four of the cases. This contention can best be refuted by an analysis of the cases.

One of the opinions referred to is the "Georgia" opinion. So far as appellees can ascertain, no such opinion was ever rendered upon this subject by a District Court of the United States in Georgia. The reference of appellants to a Georgia case apparently results from a mistaken reference of the court to such a case in the *Premier-Pabst Sales Company* v. *Grosscup,* (12 Fed. Supp. 970, E. D. Pa. 1935).

The case of *Joseph Triner Corporation* v. *Arundel,* (11 Fed. Supp. 145, D. C. Minn. 1935) is discarded by appellants by the mere statement that the court declined to pass upon the application of the 21st Amendment to those states that recognized liquor as an article of commerce, resting its decision entirely upon a violation of the 14th Amendment. It is true that the Court found it unnecessary to base its opinion upon the Commerce Clause alone, but the language used by the Court leaves no doubt as to the views entertained upon that subject. That case involved the construction of a statute of the State of Minnesota forbidding the importation by any licensed manufacturer or wholesaler of any brand of intoxicating liquor containing more than 25 per cent. of alcohol ready for sale without further processing, unless such brand should be registered in the United States Patent Office. No like registration of brands was required of intoxicating liquors manufactured within the state. It was said by the Court:

"The contention of the defendants is that chapter 390 represents a proper exercise of its police power by the state and is in no respect violative of the Constitution of the United States. They also contend that, since the adoption of the Twenty-first Amendment to the Constitution of the United States, neither the commerce clause nor the equal protection clause applies to intoxicating liquor, and that the power to control the manufacture, importation, and use of such liquor was, without any restrictions, conferred upon the states by virtue of the provision of the Twenty-first Amendment, that 'the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.'

"With the contention that by this language it was intended that intoxicating liquors should be excepted from the provisions of the commerce clause and other provisions of the Constitution of the United States, we are unable to agree. The purpose of the provision referred to was to make it impossible for Congress to permit the transportation or importation into any state, territory, or possession of the United States of intoxicating liquors in violation of the laws of the state, territory, or possession. In other words, the provision left the states, territories, and possessions free to determine to what extent, if at all, intoxicating liquor should be a lawful subject of commerce within their limits."

The case of *General Sales & Liquor Company* v. *Becker* (14 Fed. Supp. 348, E. D. Mo. 1936) is apparently thought by appellants to be adverse to the contentions asserted in this case. The propositions therein decided are in entire harmony with appellees' position here and are, in fact, in support of it. The statute assailed limited a non-resident wholesale dealer in intoxicating liquors to sales to licensed wholesalers within the state, whereas a resident wholesale dealer was free to sell to licensed retailers. The discrimin-

ation there complained of was one against persons, the court clearly pointing out that no discrimination was made under the statute between products. That a state may entirely exclude a non-resident from engaging in the sale of liquors within its borders and limit sales solely by residents, no one will doubt. So holding, the court necessarily found that in limiting a non-resident in the sales which he made within the state to licensed wholesalers, no discrimination was made which was the subject of complaint by him. Again, the views of the court expressed upon the question raised in this appeal admit of no doubt as to the conclusion that a state statute may not be so designed as to discriminate against the products of another state. It was said:

> "The adoption of the Twenty-first Amendment has without doubt limited and qualified the commerce clause to the extent that state laws, regulating the importation of liquor into a state, place no prohibited burden upon commerce. This conclusion is in complete accord with that of the District Court in *Joseph Triner Corporation* v. *Arundel,* 11 F. Supp. 145, where it was determined that the purpose of the amendment was not to except intoxicating liquors from the provisions of the commerce clause. The amendment does recognize the authority of the state to regulate the movement of liquor into the state, and where availed of, as in this case, the importation of intoxicating liquors in violation of local law is outside the commerce clause."

The concurring opinion of Circuit Judge Farris clearly expresses the position of appellees in this case, wherein it is said:

> "So, the sole contention here made by plaintiff is that being a wholesale dealer, but a non-resident of Missouri, it is forbidden by the Liquor Control Act of Missouri to sell liquor to retail liquor dealers; while resident wholesale dealers may do so. There cannot, I think, be urged as existing any discrimination in the statutes attacked, as between liquors of

foreign manufacture and those of domestic manufacture; for the agreed facts disclose that both beer and distilled spirits of foreign manufacture can be sold, and are being sold, in Missouri by licensed resident wholesalers, without let or hindrance. So, I think the sole question in the case is, in the final analysis, whether the state of Missouri has the right under the police power to require by statute that a wholesale dealer in intoxicating liquor must be a resident of Missouri. This is conceded by plaintiff in its brief to be the sole question up for judgment, for it admits that 'the sole basis of the discrimination is resident or non-residence.' I think the alternative, that if such dealer does not see fit to become a resident of Missouri, then it must sell by or through such a resident, in no wise affects the principle involved. So, I repeat, the discrimination found in the Missouri statute is not against the commodities, but solely as to who may be licensed to sell them, and as seen this discrimination goes no farther than to require the seller to be a resident of Missouri. It is a *discrimination as to residence and not one of citizenship,* and no reason appears why plaintiff may not, by becoming a resident of Missouri, become qualified to sell both domestic or foreign liquors to retailers; so far, at least, as the two sections of the statute, herein attacked, are concerned. I am not saying that the necessity for a change of domicile might not in some situations be a burden on interstate commerce, but not in this case.

"Plaintiff bottoms its contention of discrimination on the alleged violation by the accused statute of the commerce clause of the Federal Constitution and of that provision of the Fourteenth Amendment which forbids any state to pass a statute which deprives any person of the equal protection of the law. It may urge, of course, both of the contentions; but not being a citizen, or even a resident of Missouri, and being a corporation, it may not rely on any right to an equality with citizens of Missouri,

under that provision of the Fourteenth Amendment which provides for an equality of 'privilege and immunities.'

"I agree with the view taken by the courts in the case of *Joseph Triner Corporation* v. *Arundel* (D. C.) 11 F. Supp. 145, and *Young's Market Co.* v. *State Board of Equalization* (D. C.) 12 F. Supp. 140, that section 2 of the Twenty-first Amendment did not have the effect to abrogate the commerce clause of the Federal Constitution, in those states of the Union which, as is Missouri, are as 'wide open' in the matter of liquor traffic as it is possible to be and as they were prior to the adoption of the Eighteenth Amendment."

Philip Blum & Co. v. *Henry* (D. C. E. D. Wisc., March 28, 1936), referred to in appellants' brief (p. 130), involved a statute of the same design as that involved in the *Becker* case. The difference of treatment by the statute was one relating to persons and not property. The non-resident vendor or licensee was more limited in the sale of intoxicating liquor than a resident holder of a like license. A statute of this type marks a sharp contrast from a statute of the type involved in this appeal wherein the commodity is discriminated against because of its out of state origin.

All that can be said for the case of *Premier-Pabst Sales Company* v. *McNutt* (D. C. Ind., Jan. 4, 1935), is that there was a case by such title instituted in the United States District Court of Indiana, but, following the submission of the case and before its decision, the law challenged was repealed by the Legislature of the State and a new bill was enacted. Prior to the enactment of the new law, Judge Baltzell prepared an unsigned memorandum opinion, which opinion was not concurred in by the other judges.

In *Pacific Fruit and Produce Co.* v. *Martin*, decided by a three-judge court, (D. C. W. D. Wash., Feb., 1936), a statute of the State of Washington provided that brewers and beer wholesalers, whose products were sold by license in the State, but whose plant or principal place of business was located elsewhere, should be deemed to be beer whole-

salers within the provisions of the law and should obtain wholesalers' licenses. In holding the Act invalid, the court disposes of the appellants' contention in this case by the use of the following language:

> "The statutes of which particular complaint is made, Section 2 of Chapter 158 of the Session Laws of 1935 and Section 3 of Chapter 174, of the Session Laws of 1935, if construed and applied as described in the bill of complaint, in conjunction, violate the commerce clause, Article 1, Section 8, Clause 3 of the Constitution of the United States, unless the Twenty-first Amendment repealed the commerce clause, insofar as interstate commerce in intoxicating liquor, is concerned. This it did not do. *Young's Market Co.* v. *State Board of Equalization,* 12 F. Supp. 140; *Joseph Triner Corporation* v. *Arundel,* 11 F. Supp. 145.
>
> "While it may be conceded that the intent of the Wilson Act, 26 Stat. 313, the Webb-Kenyon Act, 37 Stat. 699-49 Stat. 877, the Act of March 22nd, 1933, 48 Stat. 19, Sec. 6, referred to in defendants' brief as the 'Collier Act,' repealed and in part reenacted, 49 Stat. 877, Sec. 202 (a) and (b), and the Twenty-first Amendment, was to take from intoxicating liquor the protection of the interstate commerce laws insofar as necessary to deny them an advantage over the intoxicating liquors produced in the state into which they were brought, yet, none of them show an intent or purpose to so abdicate control over interstate commerce as to permit discrimination against the intoxicating liquor brought into one state from another.
>
> "It has been contended, upon behalf of defendants, that Section 2 of Chapter 158, *supra,* of which complaint is made, does not so discriminate. With this contention we are unable to agree. This enactment, in the case of intoxicating liquor made and purchased without the State, denies to the owner the right to use it as he could use it if made within the

state. If made within the state both the owner and the state could reach the manufacturer and compel observance of its law or obtain relief for its violation, but neither the owner nor the State has such power over the outside manufacturer who in no way is within the state.

"It follows that Section 2 of Chapter 158, *supra,* is void, not only because it violates the commerce clause, Article I, Section 8, Clause 3, but also the Fourteenth Amendment, in that its endorsement, as proposed, would take from the plaintiff its property without due process of law, and also in that it denies plaintiff the equal protection of the law. *Young's Market Co.* v. *State Board of Equalization,* 12 F. Supp. 140.

"If the decision of the District Court for the Eastern District of Pennsylvania, in *Premier-Pabst Sales Corp.* v. *Grosscup, et al.,* 12 F. Supp. 970, is opposed to any of the conclusions which we have reached we feel constrained, both upon reason and the persuasiveness of the authorities herein cited, to so hold without qualification. * * *

"The orderly and secure regulation of the manufacture and sale of property in each of the states by such states and of the regulation and fostering of commerce between them require that neither trammel nor encroach upon that authority which belongs to the other. The authority of neither is to be extended by construction of constitution or statute beyond what is clearly implied from the recognized authority of each. This enactment attempts to reach beyond the State's actual authority and take something from that of the nation, a sister state and the individual."

The case of *Premier-Pabst Sales Company* v. *Grosscup,* (12 Federal Supplement 970, D. C. E. D. Pa. 1935), is concededly adverse to the position of the appellees in this case. The decree of the trial court dismissing plaintiff's bill was affirmed by this Court solely on the ground that no

justiciable controversy was presented by appellants in that it was in no position to complain of the discrimination of the statute. As evidenced by the language of the court in the *Pacific Fruit* case, appellees are not alone in their disagreement with the logic of that opinion.

Thus, an analysis of the cases, important to this Court only for the logic and reasoning employed, discloses that but one of the six cases decided since the adoption of the Twenty-first Amendment holds to the contrary of appellees' position. No importance may be attached to the denial of the petition for certiorari by this Court in the case of *Rosen* v. *Fry,* 296 U. S. 526. The petition was denied on the ground that there was not properly presented a substantial federal question, this not because there was no substantial federal question involved, but because it was not properly presented. The fourth paragraph of the petition referred to in appellants' argument discloses the very legal insufficiency of such petition to raise the federal question before this Court.

APPENDIX G

The following statement from an Article by D. O. McGovney, now Dean of California Law School, in 3 Iowa Law Bulletin 145, May, 1917:

> "Can a state prohibit receipt within the state or transportation into the state of interstate liquor while leaving open traffic in home produced liquor? The Webb-Kenyon Law, taken literally, seems to permit this. It will doubtless be held, however, that it is not within the intention of the statute to deprive transportation of intoxicants into such a state of its interstate character. See the similar holding as to the Wilson Act, *Scott* v. *Donald,* (1897) 165 U. S. 58, 100—'That law was not intended to confer upon any state the power to discriminate injuriously against the products of other states, * * * evidently equality or uniformity of treatment under state laws was intended.' See also the dictum in *Plumley* v. *Massachusetts,* (1894) 155 U. S. 461, 471."

FILE COPY

DEC 2 193

CHARLES ELMORE C
CL

Supreme Court of the United States

OCTOBER TERM, 1936

No. 22

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al.,
Appellants,

vs.

YOUNG'S MARKET COMPANY, et al.
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PETITION FOR REHEARING

FREDERICK H. WOOD,
Of Counsel.

M. J. DONNELLY,
C. J. LYNCH, JR.,
WILLIAM M. DALLAS,
JOHN E. O'HORA,
Counsel for Appellees.

Hawkeye-Record Press, Mount Vernon, Iowa

TABLE OF CONTENTS

PAGE

PETITION FOR REHEARING 1

CERTIFICATE 3

BRIEF

I

Appellees Ask no Rewriting of 21st Amendment..... 4

Contention as to Effect of 21st Amendment based on Distinction between Commercial and Police Power 5

Fact that before the Amendment a State Could not tax the right to import, does not warrant the conclusion that it may discriminatorily tax such right under the Amendment 10

Conceding the power of a state to establish a monopoly, the power to discriminate does not follow 11

Legalizing trade and commerce in domestic beer while excluding foreign beer not a proper exercise of police power 12

Power to prohibit does not include power to discriminate 13

PAGE

21 Amendment not the test of state power..... 15

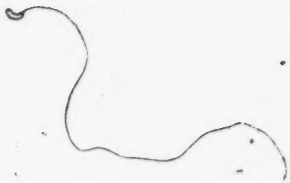
Are the Provisions of the Act Discriminatory?..... 15

II

Do the Provisions of the State Act Complained of Violate the Equal Protection Clause of the 14th Amendment? 17

TABLE OF CASES CITED

	PAGE
Asbell v. *Kansas*, 209 US 251	6
Baldwin v. *Seelig*, 294 US 511	14
Brown v. *Maryland*, 25 US 419	16
Colgate v. *Harvey*, 296 US 404	19
Cook v. *Pennsylvania*, 97 US 566	16
Crossman v. *Lurman*, 192 US 189	5
Emert v. *Missouri*, 156 US 296	5
Foster-Fountain Pack. Co. v. *Haydel*, 278 US 1	13
Geer v. *Connecticut*, 161 US 519	6
Kidd v. *Pearson*, 128 US 1	20
Leisy v. *Hardin*, 135 US 100	13
Mintz v. *Baldwin*, 289 US 346	6
Oregon, Washington RR Co. v. *Washington*, 270 US 87, 101	6
Pabst-Brewing Co. v. *Crenshaw*, 198 US 17, 26	8
Philips v. *City Mobile*, 208 US 472	12
Plumley v. *Massachusetts*, 155 US 461	5
Premier-Pabst Sales Co. v. *Grosscup*, 298 US 226	16
Prout v. *Starr*, 188 US 537	5
Schollenberger v. *Pennsylvania*, 171 US 1	16
Scott v. *Donald*, 165 US 58, 100	8
Silz v. *Hesterberg*, 211 US 31	6
Sligh v. *Kirkwood*, 237 US 52	5
State Freight Tax Cases, 15 Wall 232	6
State of Ohio v. *Helvering*, 292 US 360	11
United States v. *Hill*, 248 US 420, 426	7
Vance v. *Vandercook*, 170 US 438, 450	9
Walling v. *Michigan*, 116 US 446	20
Welton v. *Missouri*, 91 US 275	18
Wilkerson v. *Rahrer*, 140 US 545	5, 6



Supreme Court of the United States

OCTOBER TERM, 1936

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al.,
Appellants,

vs.

YOUNG'S MARKET COMPANY, et al.
Appellees.

No. 22

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Come now the Appellees in the above entitled cause and present this, their Petition for a Rehearing of said cause, and in support thereof respectfully show:

I

The Court erred in holding:

(a) that the sustaining of plaintiffs' contention would require a rewriting of the 21st Amendment;

(b) that the case does not present a question of discrimination prohibited by the Commerce Clause;

(c) that under the 21st Amendment and the Commerce Clause, the State is not required, if it permits manufacture and sale, to let imported liquors compete with domestic liquors on equal terms;

(d) that a state may permit the domestic manufacture and sale of beer and exclude all made without the state;

(e) that the fees exacted from an importing wholesaler are not violative of the Commerce Clause.

II

The Court erred in holding that the Act of the State of California, in the provisions complained of, is not violative of the Equal Protection Clause of the 14th Amendment.

In support of this Petition for Rehearing, appellees submit the Brief hereto appended.

Wherefore, upon the foregoing grounds, it is respectfully urged that a rehearing be granted, and that the decree of the District Court be affirmed.

Respectfully submitted,

FREDERICK H. WOOD,
Of Counsel.

M. J. DONNELLY,
C. J. LYNCH, JR.,
WILLIAM M. DALLAS,
JOHN E. O'HORA,
Attorneys for Appellees.

CERTIFICATE

I, M. J. Donnelly, hereby certify that I am one of the attorneys for the Appellees in the above entitled cause, and that the foregoing Petition for Re-hearing is not presented for purposes of delay or vexation, but is presented in good faith, and is in my opinion well founded in law and fact and proper to be filed herein.

M. J. Donnelly

Attorney for Appellees.

BRIEF

I

In this case, this Court has for the first time passed upon the 21st Amendment. The conclusions reached are of sweeping effect. The consequences inevitably following the holding that the Commerce Clause no longer precludes discriminatory legislation as to liquors are of vital importance. The destruction of all harmony among states in their commercial relations under the sanction of the broad pronouncements of the Opinion that a state may forbid, either entirely or upon such conditions as it may prescribe, all importations of beer made without the state while freely permitting the manufacture and sale within, far transcends in importance the immediate issues of this case. For such reasons and upon the grounds of the foregoing Petition, appellees feel justified in urging a reconsideration.

If a state is now permitted, as to intoxicating liquor, to accord unequal treatment to the products of other states, or to those handling them, it is the only field in which such inequality of treatment is tolerated.

Does the 21st Amendment either in intent or in its terms necessitate or justify such conclusion?

Appellees Ask No Rewriting Of The 21st Amendment

No re-writing of the Amendment is sought. Not the slightest diminution of the proper effect of the Amendment is urged.

To determine the construction of and the effect to be given to the Amendment requires consideration not of the Amendment alone but of the Amendment as a part of the Constitution into which it is written. "The Constitution of the United States with the several amendments thereof, must be regarded as one

instrument, all of whose provisions are to be deemed of equal validity." *Prout* v. *Starr*, (188 US 537.)

Appellees' Contention As To Effect Of 21st Amendment Based Upon Distinction Between Commercial Power And Police Power.

Prior to the Amendment, concededly the states had no right to tax importation. As to intoxicating liquors, in common with other merchandise, there existed two distinct powers, the commercial power of the National Government, and the police power of the state. Prior to the 21st Amendment, the only power possessed by a state to deal differently with intoxicating liquors than it might deal with other goods generally was its police power. Certainly its power was no different thereafter. The Amendment did not confer any new power. It did say that "transportation or importation" of intoxicating liquors into any state "in violation of the laws thereof is hereby prohibited," but this did not purport to confer any new power upon the state to make its enactments the "laws thereof". Certain it did accomplish a change in the theretofore supremacy of the Acts of Congress in the exercise of commercial power over the acts of a state in the exercise of its police power. But, recognizing the supremacy of state acts in this field, the distinct nature of the two powers was in nowise impaired.

Numerous cases have recognized the distinction between the commercial power as to which the National Government is supreme and the police power of the state, and have held that that which was not a part of commerce was within the police power of the state. *Wilkerson* v. *Rahrer*, (140 US 545). Compare also *Plumley* v. *Massachusetts*, (155 US 461) as to colored oleomargarine; *Crossman* v. *Lurman*, (192 US 189), artificially colored coffee; *Emert* v. *Missouri*, (156 US 296) requiring license of itinerant peddlers; *Sligh* v. *Kirkwood* (237 US 52) pro-

hibiting exportation of immature citrus fruit; *Asbell* v. *Kansas*, (209 US 251), *Mintz* v. *Baldwin*, (289 US 346), diseased cattle; *Geer* v. *Connecticut* (161 US 519), *Silz* v. *Hesterberg*, (211 US 31), importation of wild game.

The state statutes in the cited cases were those enacted under the police power, the purpose of which being not to regulate commerce but to protect the public morals, health, safety, etc.

As said in *Oregon, Washington etc. R. R.* v. *Washington*, (270 US 87, 101):

> "In the relation of the States to the regulation of interstate commerce by Congress there are two fields. There is one in which the state cannot interfere at all, even in the silence of Congress. In the other, and this is the one in which the legitimate exercise of the state's police power brings it into contact with interstate commerce so as to affect that commerce, the state may exercise its police power until Congress has by affirmative legislation occupied that field by regulating interstate commerce and so necessarily has excluded state action."

In case of *State Freight Tax*, (15 Wall 232), (cited in the Opinion), the distinction between the police power and the commercial power is clearly recognized.

> "Cases that have sustained State laws, alleged to be regulations of commerce among the states, have been such as related to bridges or dams across streams wholly within a State, police or health laws, or subjects of a kindred nature, not strictly commercial regulations."

In *Wilkerson* v. *Rahrer* (140 US 545), in which the validity of congressional action was held to rest upon this distinction, it was said:

> "'The power to establish such regulations, as was said in *Gibbons* v. *Ogden*, 22 US 9 Wheat. 1, 203, (6:23, 71), reaches everything within the territory of a State not surrendered to the National Government.' But

it was not thought in that case that the record presented any question of the invalidity of State Laws, because repugnant to the power to regulate commerce among the States. It is upon the theory of such repugnancy that the case before us arises, and involves the distinction which exists between the commercial power and the police power, which 'though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them.'"

If the power of the state before the Amendment and now, to legislate either in prohibition or regulation of commerce in intoxicating liquor, is solely police power, when any state legislation is challenged, is not the only question for decision whether the legislation is a proper exercise of police power?

The Amendment removes limitations restricting state action when such action is confined to the appropriate power of the state. Still there remains the commercial power in the National Government. The police power of the state, the scope of which has been thus enlarged, and the Commerce Clause still co-exist. Congress still can forbid transportation of all liquor in interstate commerce, notwithstanding the power in each state to legalize the traffic in liquor within its borders. *United States* v. *Hill*, (248 US 420, 426). Thus, under the Commerce Clause, Congress can prohibit that which a state permits, but Congress cannot, since the 21st Amendment, legislate to permit that which a state in the proper exercise of its police power prohibits. If this be not so, then the Amendment is to be given a construction which does require a rewriting, a construction that the commercial power has been withdrawn from Congress as to liquor without express words in the Amendment, and such acts of the Congress as the "Public Enforcement Act of 1936, Act of June 25,

1936" (Public Law 807), regulating interstate traffic in liquors, are, therefore, beyond the power of Congress.

The State may now exercise its police power unfettered by the commercial power so long as such legislation is an appropriate exercise of the police power. But, "The question whether a given state law is a lawful exercise of the police power is still open and must remain open to this Court." *Scott* v. *Donald,* (165 US 58, 100).

"Certainly the regulation of the sale of liquor is essentially a police power." *Pabst Brewing Company* v. *Crenshaw,* (198 US 17, 26). By reason of the Amendment a state may ban all commerce in intoxicating liquor. In so doing it does not discriminate. It exercises its police power. Likewise, it may license or regulate the manufacture, handling, and sale of liquor. If it does so without discrimination against the products of other states and those engaged in handling them, it properly exercises its police power and under the Amendment the Commerce Clause interposes no obstacle to its so doing.

If it does not remove such liquors from the field of commerce but undertakes, in legalizing and regulating commerce therein, to injuriously discriminate against the products of other states, it is, in so doing, not exercising police power but is entering the domain of commercial power, and the Commerce Clause still stands to forbid such action.

If a state may prohibit, either directly or by the imposition of a prohibitory importation tax, the introduction into the state of foreign liquors while at the same time adopting a policy of permitting domestic manufacture, sale, and use of such liquors, it follows that a state may use its police power to foster and promote its own industries in the manufacture and sale of domestic products by excluding all competition with the products of other states. By so prohibiting, the power of the state would be directed at foreign manufactured liquors not because they were liquors but because they were foreign. Such state action clearly is the

exercise of a commercial power and, in the correct sense of those words, not a police law.

In *Vance v. Vandercook Co.*, (170 US 438, 450), (cited in the Opinion), speaking of a state law which injuriously discriminated against the products of other states, this Court said that a law "in consequence of such discrimination was not a police law in the correct sense of those words". If, then, state power is police power, and if a law discriminating against the products of another state is not, as to such aspect thereof, a police law, in the correct sense of those words, does not the law as clearly offend now as before the Amendment?

While the Amendment provides that:

> "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquor in violation of the laws thereof is hereby prohibited,"

surely it cannot be said that every statute enacted by the state as a police regulation is beyond challege as an improper exertion of state power. If injurious discrimination stamps the statute as not a proper police law "in the correct sense" of those words, is the statute any less void now than before the adoption of the Amendment?

To hold that the Amendment removes all restrictions on state legislation when the state is confining its laws to the proper exercise of police powers gives the Amendment every force and effect that its language and the purposes and intent procuring its adoption require. To hold that the Commerce Clause still forbids state action in the commercial field involves no rewriting of the Amendment nor any departure from the plain language thereof. The insistence that equality of treatment must be accorded is not based upon an assertion that such condition must by construction be written into the Amendment. It is founded upon what is asserted to be the effect of the provisions of the Constitution, including the Amendment as a part thereof.

The Fact That Before The Amendment A State Could Not Tax The Right To Import, Does Not Warrant The Conclusion That It May, Under The Amendment, Discriminatorily Tax Such Right.

Because a state could not, before the 21st Amendment, have exacted a fee for the privilege of importation "even if it had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business," the Opinion concludes that this case does not, therefore, "present a question of discrimination prohibited by the Commerce Clause." To say that prior to the Amendment, under the Commerce Clause, unaffected by Congressional permission, the state could not tax importation, and that the Commerce Clause conferred the right to import free, is but to recognize that importation was within the field into which the state in the exercise of its police power had no right to enter. Any tax sought to be imposed by a state for this privilege was void not because the state was exercising a commercial power, but because it was exercising its police power over a field in which the federal commercial power was supreme.

When the state undertook to discriminatorily tax intoxicating liquors which had left the channels of interstate commerce, its action was void, not because it was acting in a field in which the power of Congress was supreme, but because its effect was to exert a commercial regulation, not a police regulation. In other words, before the Amendment the situation was simply this: a State could not, under the guise of its police power, regulate commerce by discriminating against articles because they had been in commerce, nor could it exercise its police power upon a field over which the action of Congress was supreme so long as Congress refrained from permitting State action.

In determining the validity of State legislation, is it not now a question which is resolved by an investigation to ascertain

whether the legislation is a proper exercise of police power, or whether it is an invasion of commercial power? Such investigation is not now to be precluded because before the Amendment the State could not exert its police power upon the field of commerce and, for such reason, it was unnecessary to distinguish between commercial power and police regulation so far as the validity of State action was concerned. With the Amendment redefining the lines of State and Federal supremacy in the appropriate exercise of their powers, it does now become important to determine whether the action of the State through discriminatory burdens in effect constitute commercial regulations.

Conceding The Power Of A State To Establish A Monopoly, The Power To Discriminate Does Not Follow.

If a state establishes a state monopoly of the manufacture and sale of beer, does it not thereby remove the commerce in intoxicating liquors from the field of private commerce, both as to its own citizens and those of other states, and thereby place all privately manufactured liquors upon an equal basis? If it may so do, does it follow that it may authorize and legalize the manufacture and sale within its borders and exclude or discriminatorily tax the products of other states?

If a state monopoly is established, no inequality of treatment would thereby result as between private dealing in either domestic or foreign beer. If it is permitted to establish such a public monopoly, and its conduct of such business is not a governmental function, (*State of Ohio* v. *Helvering*, 292 US 360), its prohibition of others from manufacturing and selling would be an exercise of its police power.

Legalizing Trade And Commerce In Domestic Beer While Excluding Foreign Beer Not A Proper Exercise Of Police Power.

Clearly a state may permit the manufacture and sale of beer while prohibiting absolutely hard liquors. The action so taken would be well within its police powers. Appropriate basis for such action would readily appear.

Is there not, however, a well-defined distinction between such assumed action on the part of the state and the legislation legalizing and regulating the traffic in beer but prohibiting importation or placing an injuriously discriminatory burden on foreign beer solely because of its out-of-state origin?

What conceivable object of police power could be said to be served by authorizing or encouraging the domestic manufacture and sale of beer and, at the same time, excluding the like product made in other states? If California can legally enact a law permitting domestic manufacture and sale, and prohibiting all importation, could that state prohibit the importation of all beer manufactured in New York and Pennsylvania while permitting the importation of beer manufactured elsewhere? Wherein would one enactment be any less a law thereof than the others? Would not, in either case, the State be acting beyond its police power?

If the state now has the power to tax importation, it must be subject to the qualification that in the exercise of such power discrimination does not thereby result. Whether the fee be high or low is not the test. If the exaction of a high license fee for importation is deemed necessary, then an equal exaction must be imposed in some manner upon the domestic product, or discrimination results. In *Phillips* v. *City of Mobile,* (208 US 472), the license fee was not discriminatory.

> "This license tax is exacted without reference to the question as to where the beer was manufactured,

whether within or without the state, and hence there is no discrimination in the case." (208 US 479).

Power To Prohibit Does Not Include Power To Discriminate

Is it accurate to say that because the State may prohibit all commerce in liquor, it may regulate in a manner injuriously discriminating against the products of other states? If total prohibition be enacted, liquor is removed from commerce. While before the Amendment the Commerce Clause, unaffected by Congressional Acts, precluded the states from declaring what should or should not be a part of commerce (*Leisy* v. *Hardin*, 135 US 100), the State may now declare that liquor shall be excluded from all commerce. If the state determines not to exclude but recognizes liquor as a proper subject of commerce, then the fact that it might have determined to exclude, but did not, should not permit it to regulate discriminatorily.

If it be urged that the power to prohibit confers the power to regulate arbitrarily or discriminatorily, that because all traffic in intoxicating liquors might be banned, no complaint can be made of any terms or conditions imposed in permitting such traffic, the answer is that the power to absolutely prohibit or outlaw the subject-matter as a subject of commerce, affords no basis for the claim to unreasonably or discriminatorily regulate when the subject-matter is made a legitimate subject of trade and commerce.

In *Foster-Fountain Packing Company* v. *Haydel*, (278 US 1), it is recognized, that, where a State had the right to absolutely prohibit the exportation of shrimp, but determined not so to do but to permit the product to be shipped and sold in interstate commerce, that the commodity became entitled to the rights of private ownership and the protection of the Commerce Clause. It is said:

"As the representative of its people, the State might have retained the shrimp for consumption and use

> therein. But, in direct opposition to conservation for intra-state use, this enactment permits all parts of the shrimp to be shipped and sold outside the State. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in inter-state commerce, the State necessarily releases its hold, and, as to the shrimp so taken, definitely determines its control. Clearly such authorization and the taking in pursuance thereof put an end to the trusts upon which the State is deemed to own or control the shrimp for the benefit of its people and those taking the shrimp under the authority of the Act necessarily thereby become entitled to the rights of private ownership and the protection of the Commerce Clause."

When the State enters the field of commercial power, it matters not whether the subject-matter is beer or barley. When it remains in the sphere of police power, a vast difference in its power to act is recognized. Any non-discriminatory legislation may be held to be the exercise of police power even though it may also be an exercise of the power to tax. Discriminatory legislation designed to favor State products falls without the police power, and if the Commerce Clause remains for any purpose, it protects against such legislation.

Our position cannot be better stated than in the expression, "Neither the power to tax nor the police power may be used by the State of destination with the aim and effect of establishing an economic barrier against competition with the products of another state, or the labor of its residents." (*Baldwin* v. *Seelig*, 294 US 511).

Twenty-First Amendment Not The Test Of State Power

In final analysis, does not the error of the Opinion lie in using the Twenty-first Amendment as a source of State power? It will not do to involve our reasoning in this circuity by saying that the 21st Amendment makes transportation unlawful if in violation of State law, and, to determine the validity of State law, we look to the 21st Amendment. By saying that the 21st Amendment makes unlawful the shipment of liquors into any State in violation of laws passed pursuant to power existing at the time of the adoption of the Amendment, results in the police power of the State becoming, by virtue of the Amendment, superior to the commercial power of Congress and retains perfect harmony within the Constitution and the Amendments. The effect of appellees' contention is as stated in the Opinion that—"The State may prohibit the importation of intoxicating liquors, provided it prohibits the manufacture and sale within its borders; but, if it permits such manufacture and sale, it must let imported liquors compete with domestic on equal terms,"—but such result is arrived at not by a construction of the Amendment, but by giving proper effect to the plain words of the Amendment, together with the provisions of the Constitution of which it is a part.

Are The Provisions Of The Act Discriminatory?

Thus far in our discussion we have assumed discrimination in the California statute. We have reviewed the sweeping conclusions reached which would seem to likewise assume, as the basis for their statement, the existence of discrimination. We shall now briefly point out wherein the statute complained of does in fact discriminate.

While it is true, as stated in the opinion, there is no discrimination under the statute as to the right to sell as between wholesalers selling domestic and foreign beer, it is not to be put out

of view that sale is only one phase of the wholesaler's business. Before he can sell, he must purchase, and, to determine whether he who sells imported beer is discriminated against, the burden placed upon him in carrying on the necessary elements of his business, (purchase and sale) must be compared with the burden placed upon one purchasing and selling domestic beer at wholesale. The licensee importing beer and wholesaling it is not engaged in two separate occupations. Importation is but an incident of his purchase outside the state, and purchase is as essential to his business as sale.

To make the initial sale of foreign beer in California, a wholesaler must pay a $500 importing and a $50 wholesaler's fee. A tax upon either the right to import or the right to sell, or upon both, may be considered a tax upon the commodity itself. *Schollenberger* v. *Pennsylvania,* (171 US 1); *Brown* v. *Maryland,* (25 US 419); *Cook* v. *Pennsylvania,* (97 US 566).

These cases recognize that sale is the object of importation, and an essential ingredient of that intercourse of which importation constitutes a part. A license, to import only, would be valueless.

Whether as in the Pennsylvania case (*Premier-Pabst Sales Company* v. *Grosscup,* 298 US 226), the payment of one license fee is exacted for both importation and sale, or whether two fees be required, one for importation and one for sale, the result is the determining factor on the question of discrimination. Breaking up the business unit into component parts and placing a license fee on each part cannot be made the basis for avoiding that which would be a discriminatory burden, if the occupation were treated as a unit and one fee exacted. The business embraces essentially these component parts, and the aggregate fees exacted for these privileges determines the burden placed upon the business. The total fee required to be paid before the product can be sold by the importing wholesaler is the basis for the comparison with the charges imposed upon the business of sim-

ilarly dealing in and selling domestic products. Only by comparison on that basis can it be determined whether equality of treatment exists.

To support the statement of the Opinion that this case does not present a case of discrimination prohibited by the Commerce Clause, the Court reasons that before the Amendment a state could not tax importation even if it "exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business". The comparison is made to test discrimination, and, there being no such tax imposed by the State of California upon intra-state transportation from the place of manufacture to the wholesaler's place of business, discrimination exists by the very test of the Opinion.

We, therefore, earnestly contend that, as between the importing wholesaler and the other wholesalers, discrimination exists. While so contending, we also maintain that irrespective of the treatment as between wholesalers, discrimination is found if the comparison be made as between the taxes imposed upon other businesses licensed by the Act. Our position as to this will be more fully developed hereafter.

II

Do The Provisions Of The State Act Complained Of Violate The Equal Protection Clause Of The 14th Amendment?

In the Opinion it is said: "A classification recognized by the 21st Amendment cannot be deemed forbidden by the 14th." For the purpose of the exertion of the police power of the State, does the 21st Amendment recognize a classification enabling the state in regulating the transportation and sale of liquor to impose higher taxes upon the business of those handling liquor produced out of the state than are imposed upon those handling domestic products?

Does the Amendment recognize a classification as between foreign and domestic liquors? Does it not rather remove the line previously separating such liquors as the subject of state action, and, for the exertion of police power of the state, place both domestic and foreign liquors in one class to be equally subject to state legislation? Is there then any more substantial basis for classifying such liquors on the sole ground of their origin than there is to classify ordinary merchandise which has been imported and become a part of the common mass of the property of the state from identical merchandise produced in the State? In either case, the sole basis of classification would be the place where the goods originated. A tax upon the business of handling merchandise, the imposition of a license fee, or occupation tax, is in effect an imposition of a tax on the merchandise. (*Welton* v. *Missouri*, 91 US 275).

Recognizing the right to classify and to impose different exactions upon different classes, it is, of course, essential that the classification be reasonable, not arbitrary, and rest upon some difference "that bears a just and proper relation to the attempted classification". When the state is given the same power to prohibit or regulate intoxicating liquors of foreign origin, as it has with respect to its domestic products, can it be said that the Amendment, so enlarging the field of state action by removing limitations previously existing, recognizes and preserves a line which it obliterates?

We urge, therefore, that the Amendment itself does not recognize but removes a previously existing barrier and merges for the purpose of police action the two classes: the one which the state previously possessed full power to prohibit or regulate, and the other which, in the absence of congressional permission, it could neither prohibit nor regulate.

Again, it is said that "The classification in taxation made by California rests on conditions requiring difference in treatment". If, as is here contended, discrimination exists, does the fact that

the beer sold in the state comes from two sources permit different treatment of the product, or of those handling it, when such discrimination is based wholly upon the origin of the product?

Does the difference in source justify a classification which permits higher taxes to be placed upon the occupation of importing and selling the domestic product? The classification is not made upon any difference in the things classified for they are of the same kind. It should not be sustained because the liquors are manufactured at different places as that is a purely arbitrary classification. Is there then any just and reasonable basis for the attempted classification?

When a state determines to authorize and permit private commerce in liquors, and then classifies for the purpose of imposing higher or greater burdens upon the liquor produced in other states, can the right to classify the subject-matter be found to rest upon any sufficient ground when its sole basis is the place of origin? Clearly in numerous decisions as to other merchandise, it has been held that no such basis of classification can be relied upon. Upon the point we are considering, is there any difference in principle between classification of commodities generally and liquors when the classification is sought to be sustained on no other distinction than that stated? Is not the language in the opinion in *Colgate* v. *Harvey*, (296 US 404, 423) directly applicable?

> "As the Supreme Court of Vermont itself has pointed out, in all such cases it must appear not only that a classification has been made, but that it is one based on some reasonable ground. *State* v. *Hoyt*, 71 Vt. 59, 64-66; 42 Atl. 973. The decision in that case held invalid a state statute the effect of which was to impose a tax upon sales of goods manufactured in the state, while leaving sales of goods manufactured in other states free from taxation. It was held that the classification could not be based on any difference in the goods, because there was none; nor on the fact that they were made in different states, for that bore no

> just and proper relation to the classification, but was purely arbitrary; nor on the difference of residence of the manufacturers, for the same reason. And clearly the view of the court was that a like discrimination against the products of another state would have been open to the same objections."

It is respectfully submitted that no classification recognized by the 21st Amendment warrants the state action here complained of, and that the classification in taxation made by California is not one resting upon any proper basis.

The Opinion points out that the brewer of domestic beer is required to pay a license fee of $750, while the brewer of foreign beer cannot be subject to state tax, and that only the importer can be reached, he being subject to a license fee of $500. The occupation of a manufacturer is essentially unlike that of an importing wholesaler.

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation." (*Kidd* v. *Pearson*, 128 US 1).

In *Walling* v. *Michigan*, (116 US 446), it was held that the business of soliciting and selling for nonresident concerns was not comparable to that of a manufacturer, and that the tax paid by the manufacturer was not to be compared with the tax imposed upon agents for nonresident manufacturers soliciting and selling. It was there said:

> "Of course the Act of 1875 does not assume to tax nonresident persons or firms for doing business in an-

> other state. They are subject to taxation in the state where they are located. It is the business of selling for such nonresident parties or soliciting orders for them for sale in Michigan of liquors imported into the State, that is the object of taxation under the law; and any person engaged in those employments, or either of them, is subject to the tax of $500 per annum. Now, is such a tax, or any tax imposed upon those who are engaged in the like employment for persons or firms located in Michigan, selling or soliciting orders for the sale of liquors manufactured in that state? Clearly not. The tax imposed by the Act of 1881 is a tax on the manufacturer or dealer. * * * In the one case it is a single tax on the principal; in the other it is a tax, not on the principal, for he cannot be taxed in Michigan, but on each and all of his servants and agents selling or soliciting orders for him. The tax imposed by the Act of 1875 is not imposed on the same class of persons as is the tax imposed by the Act of 1881. That this must give an immense advantage to the product manufactured in Michigan, and to the manufacturers and dealers of that state, is perfectly manifest."

Under that decision a tax upon an agent selling non-domestic liquors within the state is not rendered nondiscriminatory because a tax is imposed upon the manufacturer of domestic liquor in a greater amount, and this is true even though the foreign manufacturer cannot be taxed by the state, and only those selling the product in the state can be reached. If the occupations are so dissimilar that taxation of the manufacturer cannot render nondiscriminatory the tax imposed on the importing wholesaler, the record in this case clearly presents discrimination. However, even if the occupation of a manufacturer is to be treated as comparable to that of an importing wholesaler, discrimination appears. The importing wholesaler is required to pay a much higher fee to obtain only part of the rights received

by the manufacturer for a lesser fee. The practice of bottling by wholesalers is common throughout the country and is recognized by the State of California in this Act which provides for the issuance of a bottler's license (Juris. Stat., page 15 - Act, Sec. 5 (11) and by Rule 9 (e) of the Board of Equalization providing as follows:

> "(e) Importer's License Does Not Authorize Sale. —Every licensed importer who proposes to bottle or prepare imported alcoholic beverages or to sell such beverages in this State must first obtain appropriate Manufacturer's and Wholesaler's or Retailer's Licenses as provided in the Act. An Importer's license does not authorize bottling, preparation or resale of alcoholic beverages nor does any other license authorize importation of such beverages." (R.61)

Prerequisite to the first sale of beer bottled in California, the total fees required by the Act to be paid as to domestic beer are $750 and as to foreign beer $1050. An importing wholesaler, who bottles his imported beer in California, must pay a $500 importer's license fee, a $500 bottling or packaging fee. and a $50 wholesaler's license fee. (Juris. Stat., page 15, Sec. 5, sub-section 8, 11, 13). The California brewer pays a manufacturer's license fee of $750, and by such payment acquires the right not only to manufacture, bottle, package, and sell, (Juris. Stat., page 16, Act, Sec. 6 (a)) but the further right to purchase beer from another manufacturer, and to bottle and sell the product so purchased. (Juris. Stat., page 28, Act, Sec. 29). Thus, the manufacturer may not be an originator of the product. The privileges conferred by his license enable him not only to produce his own beer, and to bottle and package for the market and sell the same, but also to purchase, bottle, package, and market the product of others. To obtain all these privileges the local manufacturer has to obtain only one license and to pay a fee of only $750. The importing wholesaler,

to enjoy a part only of such privileges, and no other, must pay $1050.

It would seem, therefore, that from whatever standpoint the question is considered and whatever factors are held to be the proper basis of comparison, it should be concluded that equality of treatment has not resulted. In the absence of any proper basis for classification to afford a distinctly different treatment of the matter, the statute under consideration offends the Equal Protection Clause.

It is earnestly and respectfully submitted that the conclusions reached in the Opinion should be reconsidered and the Petition for Rehearing, in support of which this argument is made, sustained.

Respectfully submitted,

FREDERICK H. WOOD,
Of Counsel.

M. J. DONNELLY,
C. J. LYNCH, JR.,
WILLIAM M. DALLAS,
JOHN E. O'HORA,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 22.—October Term, 1936.

State Board of Equalization of California, et al., appellants, *vs.* Young's Market Company, et al. | Appeal from the District Court of the United States for the Southern District of California.

[November 9, 1936.]

Mr. Justice Brandeis delivered the opinion of the Court.

This suit, brought in the federal court for southern California, challenges the validity, under the Twenty-first Amendment of the Federal Constitution, of the provisions of a statute of that State, and of the regulations thereunder, which impose a license-fee of $500 for the privilege of importing beer to any place within its borders.[1] The license does not confer the privilege of selling.[2] Compare *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. —.

The plaintiffs are domestic corporations and individual citizens of California who sue on behalf of themselves and of others similarly situated. Each is engaged in selling at wholesale at one or more places of business within the State beer imported from Missouri or Wisconsin; and has a wholesaler's license which entitles the holder to sell there to licensed dealers beer lawfully possessed, whether it be imported or is of domestic make. For that license the fee is $50. Each plaintiff has refused to apply for an importer's license, claiming that the requirement discriminates against wholesalers of imported beer; and that, hence, the statute violates both the commerce clause and the equal protection clause. The bill alleges that

[1] The lower courts have differed on this question. See Triner Corporation *v.* Arundel, 11 F. Supp. 145; Premier-Pabst Sales Corporation *v.* Grosscup, 12 F. Supp. 970; General Sales & Liquor Co. *v.* Becker, 14 F. Supp. 348. See also the following unreported decisions: Premier-Pabst Sales Co. *v.* McNutt, D. Ind., January 4, 1935; Pacific Fruit & Produce Co. *v.* Martin, W. D. Wash., Southern Div., February 28, 1936; Philip Blum & Co. *v.* Henry, E. D. Wis., March 28, 1936.

[2] Constitution of the State of California, Art. XX, § 22, as amended November 6, 1934; Alcoholic Beverage Control Act, June 13, 1935, Chap. 330, §2, (k); §3; §5, (8), (13); §6, (d), (f); §7; §49; §§10, 11; §31; Rules of State Board of Equalization, Rule 9, (a), (e).

heavy penalties are exacted for importing, or having in possession, imported beer without having secured an importer's license; that unless enjoined defendants will enforce the statute; that enforcement would subject each of the plaintiffs to irreparable injury; and that the matter in controversy exceeds $3000.

The several state officials charged with the duty of enforcing the statute, were joined as defendants, and made return to an order to show cause. They assert that the challenged statutory provisions and regulations are valid because of the Twenty-first Amendment, ratified December 5, 1933, which provides, by Section 2:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

First. The main contention of the plaintiffs is that the exaction of the importer's license fee violates the commerce clause by discriminating against the wholesaler of imported beer. But there is no discrimination against them *qua* wholesalers. Everyone holding a wholesaler's license who is lawfully possessed of any beer, may sell it. The fee exacted for the privilege of selling, and the conditions under which a sale may be made, are the same whether the beer to be sold is imported or domestic, or is both. The difference in position charged as a discrimination is not in the terms under which beer may be sold. It arises from the fact that no one may import beer without securing a license therefor. What the plaintiffs complain of is the refusal to let them import beer without paying for the privilege of importation. Prior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide. The exaction of a fee for the privilege of importation would not, before the Twenty-first Amendment, have been permissible even if the State had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business. Compare *Case of the State Freight Tax,* 15 Wall.

232, 274, 277. Thus, the case does not present a question of discrimination prohibited by the commerce clause.

The Amendment which "prohibited" the "transportation or importation" of intoxicating liquors into any state "in violation of the laws thereof," abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

The plaintiffs argue that, despite the Amendment, a state may not regulate importations except for the purpose of protecting the public health, safety or morals; and that the importer's license fee was not imposed to that end. Surely the State may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee? Compare *Slaughter House Cases,* 16 Wall. 36; *Vance* v. *W. A. Vandercook Co.,* (No. 1), 170 U. S. 438, 447. There is no basis for holding that it may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domestic manufacture of beer and exclude all made without the State, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee? Moreover, in the light of history, we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic. Compare *Phillips* v. *City of Mobile,* 208 U. S. 472, 479.

The plaintiffs argue that limitation of the broad language of the Twenty-first Amendment is sanctioned by its history; and by the decisions of this Court on the Wilson Act, the Webb-Kenyon Act

and the Reed Amendment.[3] As we think the language of the Amendment is clear, we do not discuss these matters. The plaintiffs insist that to sustain the exaction of the importer's license-fee would involve a declaration that the Amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization.

Second. The claim that the statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth. Moreover, the classification in taxation made by California rests on conditions requiring difference in treatment. Beer sold within the State comes from two sources. The brewer of the domestic article may be required to pay a license-fee for the privilege of manufacturing it; and under the California statute is obliged to pay $750 a year. Compare *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563. The brewer of the foreign article cannot be so taxed; only the importer can be reached. He is subjected to a license-fee of $500. Compare *Kidd* v. *Alabama*, 188 U. S. 730, 732.

Reversed.

Mr. Justice BUTLER concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[3] *E. g.*, In re Rahrer, 140 U. S. 545; Scott *v.* Donald, 165 U. S. 58; Vance *v.* W. A. Vandercook Co. (No. 1), 170 U. S. 438; Clark Distilling Co. *v.* Western Maryland Ry. Co., 242 U. S. 311; Seaboard Air Line Ry. *v.* North Carolina, 245 U. S. 298; McCormick & Co., Inc. *v.* Brown, 286 U. S. 131.